THE USA, THE ANTARCTIC TREATY, AND TERRITORIAL CLAIMS: IS REASSESSMENT IN ORDER?

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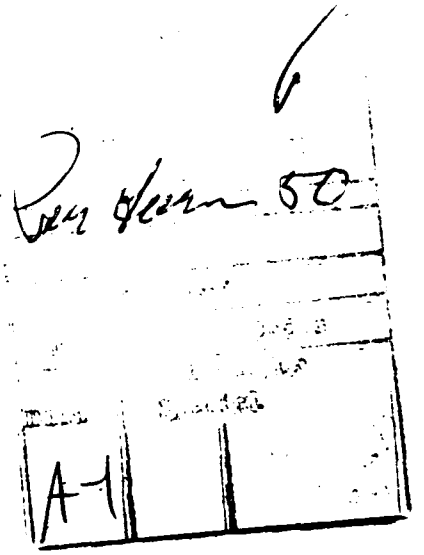

About the Author

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I. INTRODUCTION

The purpose of this thesis is twofold: first, to provide some background information on the development of the Antarctic Treaty system,* its history, and its effects; and second, to analyze the United States' position in relation to the Antarctic Treaty with an eye toward ascertaining whether or not the Antarctic Treaty is the most suitable means by which to safeguard U.S. interests in, and on, the continent. The United States is one of twenty "Consultative Parties" to the Antarctic Treaty, and this position gives the U.S. a valuable decisionmaking role in the administration of Antarctica. Since its effective date in 1961, the Antarctic Treaty has been singularly successful in reducing international conflict and promoting multinational cooperation in Antarctica: in so doing, the Treaty has been a means under which the United States has been able to effectively conduct its Antarctic operations with virtually no impediments other than Nature itself. However, with the increasing international awareness of Antarctica's potential for both living and mineral resource exploitation, increasing international competition for resources, and with rapid advances in technology making the

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*The Antarctica Treaty system will be discussed at detail infra. For the purposes of this paper, the "system" includes the Antarctic Treaty and the four subordinate international agreements thereto (see note 159, infra). The Antarctic Treaty "regime" refers to the decision-making in Antarctica by the Consultative Parties to the Antarctic Treaty.

continent much less forbidding than in earlier times, the potential for international conflict over the question of "rights" to Antarctica has appeared on the horizon and is not about to go away. The issue of territorial claims in Antarctica,[1] effectively "frozen" in 1961 by Article IV of the Antarctic Treaty, is once again surfacing and with it comes the question whether or not, in light of changing times, the Treaty can protect the substantial historical, scientific, and fiscal interests which the United States has in the continent. This paper will examine several options for U.S. policy choices in Antarctica, assess their relative merits and weaknesses, and suggest a plan of action which, in light of all considerations, is submitted to be the most favorable alternative to ensure that, despite changing world conditions, the United States will not lose its position of advantage on the Antarctic continent.

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[1]See, e.g., F. Auburn, ANTARCTIC LAW AND POLITICS (1982); P. Quigg, A POLE APART: THE EMERGING ISSUE OF ANTARCTICA 110-41 (1983); Alexander, A Recommended Approach to the Antarctic Resource Problem, 33 U. MIAMI L. REV. 371 (1978); Bernhardt, Sovereignty in Antarctica, 5 CAL. W. INT'L L.J. 297 (1975); Cruz, The Antarctic System and the Utilization of Resources, 33 U. MIAMI L. REV. 427 (1978); Hayton, The "American" Antarctic, 50 AM. J. INT'l L. 583 (1956); Joyner, Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas, 18 SAN DIEGO L. REV. 415 (1981); Joyner, The Exclusive Economic Zone and Antarctica, 21 VA. J. INT'L L. 691 (1981); Oxman, The Antarctic Regime: An introduction, 33 U. MIAMI L. REV. 285 (1978); Toma, Soviet Attitude Towards the Acquisition of territorial Sovereign in the Antarctic, 50 AM. J. INT'L L. 611 (1956); Note, Quick, Before It Melts: Toward a Resolution of the Jurisdictional Morass in Antarctica, 10 CORNELL INT'L L.J. 173 (1 76); Note, Thaw in International Law/ Rights in Antarctica Under the Law of Common Spaces, 87 YALE L.J. 804 (1978). See also Parriott, Territorial Claims in Antarctica, 22 STANFORD J. INT'L L. 67 (1986).

II. HISTORICAL BACKGROUND

A. The Place Called Antarctica

There is no place on earth like Antarctica.[2] The last of this planet's continents to be discovered and explored, it is believed that during the Mezoic Era Antarctica was originally part of a supercontinental land mass referred to as Gondwanaland, comprised of the areas we know now as Africa, Australia, India, Madagascar, and South America.[3] Antarctica is hypothesized to have separated from this land mass as a result of continental drift and to have settled at its current position.[4] It has been said that the Antarctic continent is essentially a giant ice cube,[5] but such is a description which fails to describe the true composition of the continent. Unlike the northern Arctic region, Antarctica is a continental land mass (and the fifth largest continent) covering more than

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[2]As discussed in this article, Antarctica is defined as the mass of ice and land, including ice shelves, existing south of sixty degrees South latitude. This definition corresponds to the definition contained in Article VI of the Antarctic Treaty. Antarctic Treaty, Dec. 1, 1959, 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961).

[3]Schachter, S. & Schuyler, C., The Antarctic Minerals Policy of the United States 1 (Sept., 1984).

[4]Id. at 1.

[5]Burton, Antarctic Resources, 65 VA. L. REV. 421 (1979).

five million square miles,[6] ninety-seven percent of which is covered by permanent ice[7] which averages more than one mile thick.[8] While Antarctica does contain the Trans-Antarctic Mountains which peak at 8,000 to 15,000 feet above sea level, the vast majority of this range is covered by the permanent ice and only a few hundred feet of mountain protrude above ice.[9]

The mainland of Antarctica consists of two physically distinct regions, Eastern Antarctica and Western Antarctica. Eastern Antarctica is a large, high-altitude, ice-covered plateau; Western Antarctica is an archipelago of mountainous islands joined together by ice.[10] Eastern Antarctica is the world's largest and driest desert;[11] precipitation there averages under one inch annually.[12] Severe winds in Antarctica

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[6]See U.S. Activities in Antarctica: Hearings Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess. 4 (1979) (statement of Dr. Edward P. Todd, Director, Division of Polar Programs, National Science Foundation); Fletcher & Kelly, The Role of Polar Regions in Global Climate Change, in POLAR RESEARCH: TO THE PRESENT, AND THE FUTURE 97 (M. McWhinnie ed. 1978); RESEARCH IN THE ANTARCTIC 367 (L. Quam ed. 1971) [area of Antarctica 12,393,000 km^2 excluding offshore islands and protruding ice shelves); de Blij, A Regional Geography of Antarctica and the Southern Ocean, 33 U. MIAMI L. REV. 299, 305 (1978); Bertrand, Antarctica: Conflict or Compromise?, FRONTIERS, Autumn 1978, at 9.

[7]Parriott, Territorial Claims in Antarctica, 22 Stanford J. Int'l L. (1986).

[8]Id. at 70 n. 9.

[9]See Burton, supra note 5, at 425.

[10]See Parriott supra note 7, at 70.

[11]Id.

[12]Id.

cause constant blizzards despite the lack of snow.[13] Antarctica is also the coldest continent, with temperatures frequently falling to -80° C (-112° F) in the interior and to -70° C (-94° F) in coastal areas.[14]

Antarctica is also surrounded by thick and relatively permanent fields of ice called ice shelves.[15] Parts of the ice shelves frequently break off, forming icebergs.[16] These icebergs make navigation in the water surrounding Antarctica hazardous, and pose a severe obstacle to future offshore activities.[17] In addition to the ice shelves, a ring of small, floating ice called pack ice surrounds the Antarctic mainland.[18] During the winter the pack ice extends seaward, nearly doubling the size of the continent.[19] Despite all this ice, the general lack of precipitation throughout Antarctica creates desert-like conditions regarding the water supply.[20] Virtually the only source for fresh water on the continent is

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[13] Id.

[14] Id.

[15] Id.

[16] See Parriott supra note 7, at 71.

[17] Id.

[18] Id.

[19] Id.

[20] U.S. Central Intelligence Agency, Polar Regions Atlas 37 (1978).

melted snow and ice.[21] With regard to the nearest land mass neighbors, it is 600 statute miles to South America, 1,600 miles to New Zealand, 600 miles to Australia, and 2,450 miles to South Africa.[22]

The continent of Antarctica is surrounded by the Southern Ocean, which is basically distinguished from its contiguous (Atlantic, Pacific, and Indian) oceans by the Antarctic Convergence where water chilled by the Antarctic climate and melted ice meets the warmer waters of the other aforementioned oceans.[23] The Antarctic Convergence is geographically located approximately between 46° South latitude and 62° South latitude.[24] Within the Southern Ocean and near the Antarctic coast exists a food chain which contains abundant quantities of phytoplankton, zooplankton (such as krill), marine mammals (for example, seals and whales), marine birds (including penguins), and other living resources. A more detailed analysis of these and other Antarctic resources will be reserved for later discussion.

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[21]Burton, supra note 5, at 425.

[22]Id. at 426 n. 25.

[23]Id. at 426 n. 29.

[24]Knox, The Living Resources of the Southern Ocean: A Scientific Overview, in ANTARCTIC RESOURCES POLICY 22-25 (O. Vicuna ed. 1983).

B. The Issue of Territorial Claims In Antarctica

1. Bases for Claims

As might be expected in assertions of sovereign interest in the last continent discovered, most claims to either territorial sovereignty or to a basis for any future claim to territorial sovereignty are founded on acts of discovery. Only Argentina and Chile, of the Antarctica claimant nations, do not found their respective claims on discovery.[25] Claims to territorial sovereignty assert an exclusive right to exercise governmental authority, or to display the activities of a state, within the claimed territory.[26] The assertion of sovereignty over a territory is basically the assertion of an exclusive right to prescribe and enforce laws forbidding entry without permission into that territory, and includes imposing extensive limitations on permitted activities within the territory. Accordingly, claimant states deny that anyone can enter upon their respective claimed Antarctic territories without the claimant state's consent, and subject to such conditions and limitations as the claimant state may impose. A sovereign state's discretion in such matters is limited only by generally applicable principles of international law.[27] Along with such asserted territorial sovereignty comes its corollary:

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[25]Auburn, supra note 1, at 6.

[26]Burton, supra note 5, at 460 n. 166.

[27]Id. at 460.

the potential to claim submarine land and waters adjacent to the claimed coastline.[28] Thus, along with issues of territorial claims evolved issues of coastal states' rights for the purpose of exploring and exploiting the natural resources of any claimed territorial sea and/or continental shelf.[29]

By the mid-1940s, seven countries -- Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom -- had made territorial claims to approximately 80% of the Antarctic continent.[30] The remainder of Antarctica was, and still is, unclaimed. With the advent of the International Geophysical Year in 1957, five other nations (Belgium, Japan, South Africa, the United States, and the USSR) claimed an interest in Antarctica but none made an official territorial claim or recognized the territorial claims made by other nations.[31]

There are several theories upon which territorial claims and the right to assert such claims in the future have been historically premised. While in general sovereignty over territory can be grounded on theories of occupation, prescription, conquest, cession, and accretion,[32] it seems that

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[28]Jessup, Sovereignty in Antarctica, 41 AM. J. INT'L L. 117 (1947).

[29]Burton, supra note 5, at 461.

[30]Parriott, supra note 7, at 76.

[31]Luard, Who Owns the Antarctic?, Foreign Affairs 1175, 1182-83 (Summer 1984).

[32]Parriott, supra note 7, at 76 n. 62.

territorial claims in Antarctica are most logically and properly based on the theory of occupation, which is "the appropriation by a State of territory which is not at the time subject to the sovereignty of any State."[33] The validity of this position rests on the assumption that Antarctica is considered terra nullius (the territory of no one) and a strong argument for this assumption can be made based upon the uninhabited nature of the continent itself up until the twentieth century.[34] Additionally, a strong practical and political argument has been advanced for the treatment of Antarctica as terra nullius based upon the millions of dollars already expended by interested parties to secure toeholds on the continent, the consequence of which would be a tremendous unwillingness to sacrifice such investments already made.[35]

While discovery, as noted above, formed the basis for most territorial claims, it has never been considered that this basis was particularly strong because under the discovery theory, more than a visual sighting of new lands was required: discovery created only inchoate title, the perfection of which required the taking of possession coupled with acts of authority over the territory.[36] The creation of inchoate title

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[33]Id. at 77 n. 67.

[34]Kindt, Resource Exploitation in Antarctica, 14 BROOKLYN J. INT'L L. 1 (1988).

[35]Parriott, supra note 7, at 78 n. 73.

[36]Id., at 78.

prevented other nations from appropriating this discovered territory,[37] but only for a limited time: the nation with inchoate title must perfect that title by "effective occupation"[38] within a reasonable time. It is generally believed that no specific time limits can be imposed upon this "reasonable" time pericd, but that such a period is dependent on the particular conditions and circumstances of the territory.[39] For territorial claimants in Antarctica, its uninhabited character and foreboding environmental conditions most likely allow a far greater degree of flexibility in establishing a claim to perfected title than in the rest of the world. Despite such flexibility, however, numerous critics have attacked the discovery theory as a basis for title in Antarctica.[40]

Several other theories have been advanced by claimant states for the assertion of territorial claims in Antarctica. As a general rule, each of the following theories has been attacked either as being inapplicable to Antarctica or as being an improper rationale upon which to claim territorial rights. The "sector principle", originally applied to Arctic polar

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[37] Id. at 79.

[38] Id. at 78 n. 77.

[39] Id. at 79 n. 83.

[40] Auburn, supra note 1, at 7-9.

regions by Canada,[41] envisioned pie-shaped sectors emanating out from the South Pole and encompassing either the areas of Antarctica within which the claimant states have asserted territorial jurisdiction, or the east-west extremities of the mainland boundaries of the claimant state.[42] Sector theory claimants include at least Australia, France, New Zealand, Norway and Great Britain, and arguably (at least in part) Argentina and Chile.[43] This theory of territorial acquisition has been severely undercut as being inapplicable to Antarctica in that there is no mainland boundary close enough to the continent to make a plausible argument for contiguity,[44] and on the additional basis that the sector principle as applied to Antarctica lacks the geographical basis (i.e., territory of the claimant state within the defined area of claimancy) upon which the theory is predicated.[45] Other related principles such as propinquity, contiguity, and continuity have also been advanced as supplemental bases for territorial claimancy, but the validity of each has been similarly generally repudiated, primarily due to the great geographical separations between Antarctica and the claimants and, historically, due to the lack

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[41]Conforti, Territorial Claims in Antarctica, 19 CORNELL INT'L L. J. 249 (1986).

[42]Id. at 253; Parriott, supra note 7, at 87.

[43]Parriott, supra note 7, at 87 n. 144.

[44]Id. at 88 n. 147.

[45]Conforti, supra note 41, at 254.

of economic links between the claimants and the continent.[46] One final principle worth mentioning regarding the basis for territorial claims is that of uti posseditis (retention of possession by right), advanced by both Chile and Argentina.[47] The principle suggests that the nations "inherited" from Spain the borders between the South American states that existed prior to independence and, by applying the uti posseditis principle, Argentina and Chile maintain that they inherited Antarctica from Spain. To support their claim, the two states rely upon the Bull of Pope Alexander the 7th of 1483, which, basically, gave one half of the world to Spain and the other half to Portugal (Antarctica was situated entirely in that half of the world given to Spain).[48] While this theory is still used as part of the foundation for the claims of these South American nations, this position is not presently viewed as a proper basis for Antarctic sovereignty.[49]

2. Recognition/Nonrecognition of Claims

Although there have been various theories put forward for the assertion of territorial claims in Antarctica, the fact

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[46]Parriott, supra note 7, at 86. In particular, Argentina, Australia, Chile, New Zealand, and South Africa invoke continuity theory to support territorial claims. Id. at 86 n. 136; see also Joyner, The Exclusive Economic Zone and Antarctica, 21 VA. J. INT'L. L. 691 (1982), at 708 n. 94, 95.

[47]Id. at 87.

[48]Conforti, supra note 41, at 255.

[49]Parriott, supra note 7, at 87 n. 143.

remains that the seven nations making such claims are in the pronounced minority of world nations. The issue of recognition or nonrecognition of claims, however, has traditionally been one of serious national (and international) concern regarding potential conflict and, as will be examined later, is one of ever-growing importance in international affairs.

Underlying the question of the validity of territorial claims in Antarctica is an issue which essentially divides world opinion into two opposite camps: whether Antarctica should be regarded as terra nullius (territory of no one),[50] or res communis (territory common to all, and thus immune from claims of State sovereignty or national appropriation).[51] Professor Joyner succinctly encapsulates the critical distinction as applied to Antarctica as follows:

> As terra nullius, the Antarctic continent and its resources would be subject to national appropriation should the Antarctic Treaty expire in 1991. The claims asserted by claimant States, as well as proclaimed EEZs, would gain legal validity, and it is likely that other States would claim the unacquired portions of Antarctica. It is also likely that the overlapping claims of Argentina, Chile, and the United Kingdom would lead to conflict, as already happened in 1948, 1953, and 1956. Different consequences would probably result if the current treaty regime were extended and if the Antarctic region were terra nullius. In that situation, only those States that are parties to the treaty would be bound by its

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[50]See note 33 supra and accompanying text.

[51]Joyner, The Exclusive Economic Zone and Antarctica, 21 VA. J. INT'L. L. 691 (1981), at 709 n. 99.

> provisions. Because now under the treaty, a "State" may not exist on the continent, it is uncertain how the concepts of "coastal States" possessing "territorial waters" and "economic resource zones" would be applied to non-parties making claims on the continent.
>
> If considered res communis, on the other hand, Antarctica and its coastal resources would be insulated from State appropriation. The entire region, by definition, would lie beyond the reach of national sovereignty and resultant jurisdiction. Such an approach strongly resembles the "common heritage of mankind" principle that the UNCLOS III negotiations have applied to the deep seabed.[52]

The difference in the two analyses, and their effects on territorial claimants, is clear. Self interest and protection of investment dictate that claimant nations maintain their assertions of territorial rights in Antarctica by whatever theory or theories best relates to their respective historical positions. Conversely, the rest of the international community will be similarly motivated to resist any attempts at expropriation and (except for parties to the Antarctic Treaty)[53] insist that the evolving customary international law applicable, in particular, to resource exploitation beyond national jurisdiction requires dealing with Antarctica as res communis[54] under a regime analogous to those proposed in the

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[52] Id. at 709, 710.

[53] T.I.A.S. 4780; 12 U.S.T. 794; 402 U.N.T.S. 71; 54 AJIL 477 (1960) [hereinafter cited as Antarctic Treaty].

[54] Francioni, Legal Aspects of Mineral Exploitation in Antarctica, 19 CORNELL INT'L. L. J. 163 (1986).

1982 Law of the Sea Convention,[55] the Moon Treaty of 1979,[56] and the Outer Space Treaty of 1967.[57]

Additional problems exist for nations making territorial claims in Antarctica due to the fact that even if such claims were, arguendo, valid vis a vis other nonclaimant nations, there are several claims in Antarctica which overlap. The claims of Argentina, Chile, and the United Kingdom overlap and conflict in substantial part.[58] Another potential overlap that may give rise to an even greater conflict must also be taken into account: five of the original Consultative Parties (Belgium, Japan, South Africa, the USA, and USSR) to the Antarctic Treaty refuse to recognize the territorial claims of

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[55]United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), reprinted in 21 I.L.M. 126 (1982).

[56]Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature Dec. 10, 1979, art. 11(1), U.N. Doc. A/34/64, reprinted in 18 I.L.M. 1434 (1979) (entered into force July 11, 1984).

[57]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 204 art. II (entered into force Oct. 10, 1967).

[58]Joyner, supra note 51, at 708. Argentina's claim in Antarctica encompasses the area between the 25th and 74th meridians of longitude, extending in the shape of a wedge from the South Pole to the 60th parallel. Id. at 705 n. 83. Chile claims "all lands, islands, inlets, reefs, pack-ice, etc., known and to be discovered, and their respective territorial sea, lying within the limit of the sector constituted by the meridians of 53° west longitude and 90° west longitude. Id. at 706 n. 85. The United Kingdom's claim originally encompassed "all lands and territories whatsoever" in the region between 50° and 20° west longitude, and bounded on the north by the 50° parallel of south latitude. Id. at 707 n. 89.

the seven claimant nations and, having expressly preserved their rights to make territorial claims,[59] have installations situated throughout the continent and within the sectors claimed by the seven claimant nations. Perhaps the most glaring example of this conflict (and potential for future problems, absent the Antarctic Treaty) is the U.S. presence within the New Zealand claimancy, where the United States operations in McMurdo Sound are its largest[60] on the continent and, by comparison, dwarf the New Zealand presence.[61]

Of the nonclaimant states, an assessment of the positions of the United States and the Soviet Union in particular is necessary. Such special treatment is not meant to denigrate the positions or interests of any other nations with an interest (present or future) in Antarctica, but is considered for the purposes of this paper to be necessary. An analysis of the U.S. position is required as a basis for the writer's conclusions as to the recommended course of U.S. action in the future. The examination of the Soviet policy and presence in Antarctica is valuable not only to point out another approach

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[59]Antarctic Treaty, supra note 53, Article IV.

[60]S. Nelson, Briefing on U.S. Navy Role in U.S. Antarctic Program 9 (Office of the Oceanographer of the Navy, 1987).

[61]S. Nelson, Narrative for the Briefing in U.S. Navy Role in U.S. Antarctic Program 8A (Office of the Oceanographer of the Navy, Dec. 17, 1987).

to the "question of Antarctica"[62] but also to illustrate in Section V, infra, what the United States must consider with regard to another superpower in world politics in mapping out its strategy for protection of U.S. interests in Antarctica.

The "flip side" of the principle of territorial sovereignty is the principle of open use, a principle which has characterized both the U.S. and Soviet positions.[63] States adhering to this principle do not recognize claims to territorial sovereignty. No part of Antarctica under this approach can be subject to national sovereignty and, in the absence of specific treaty obligations, Antarctica is governed solely by general principles of international law. A corollary of the principle of open use is that any nation may enter the continent and undertake activities not prohibited by general international law, such as activities of resource development. The only exercise of governmental authority in Antarctica, with a few special exceptions, comes from the jurisdiction of a state over its own nationals or activities.[64] Under this view, the Antarctic continent can be considered in any of three ways: terra nullius, terra communis, or as a "special area".[65] Irrespective of which of these three concepts is applied,

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[62]Question of Antarctica: Report of the Secretary-General, 39 U.N. GAOR (Agenda Item 66), U.N. Doc. A/39/583 (1984).

[63]Burton, supra note 5, at 462.

[64]Id. at 462, n. 173-175.

[65]Id. at 463 n. 178.

however, the end result under this open use principle is nonrecognition of territorial claims. As a general corollary to this principle, nonrecognition of territorial rights would preclude the assertion of coastal state rights in adjacent offshore areas.[66]

The history of U.S. policy in Antarctica has followed a long but somewhat inconsistent path. Although it appears overly harsh to say that U.S. policy has been to have no meaningful policy,[67] the fact remains that the United States' approach to Antarctica has been ill-defined, at best.

The first evidence of a U.S. presence in Antarctica was a sealing expedition in 1790 in the South Georgia Islands.[68] Similar expeditions worked the Antarctic Peninsula area, and one such venture was by Captain Palmer of the HERO in 1820-21 which gave rise to a claim to the first "discovery" of the Antarctic continent (and, concomitantly, an intensive debate over priority of claim).[69] The first government-financed U.S. expedition was the 1840 Wilkes' United States Exploring Expedition, a scientific project to survey the coastline of what is now claimed by Australia as the Australian Antarctic

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[66]Id. at 464.

[67]Auburn, supra note 1, at 75 n. 208.

[68]Bertrand, AMERICANS IN ANTARCTICA 1775-1948 (1971), 25.

[69]Auburn, supra note 1, at 62 n. 119.

Territory. This expedition conducted its survey but did not land,[70] and no U.S. claim was made.[71]

U.S. presence in the Antarctic territory was thereafter virtually nonexistent until the 1920s. The tone for the official U.S. position regarding Antarctica was (perhaps unfortunately) set in 1924 by U.S. Secretary of State Hughes who, in correspondence with the British Ambassador to the United States stated that "the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by actual settlement of the discovered country."[72] From 1924 to 1959, the United States outwardly followed this policy under the assumption that Antarctica was not amenable to effective occupation.[73] Thus, during that period the United States did not formally ratify the territorial claims made by two U.S. citizens, Admiral Byrd and Lincoln Ellsworth. Similarly, the United States did not formally make any territorial claims in subsequent exploration of Antarctica or while establishing scientific bases there.[74] It appears that during this time it would have been possible for the United States to have made a territorial claim to

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[70]Parriott, supra note 7, at 101.

[71]Auburn, supra note 1, at 62.

[72]Id. supra note 1, at 64 n. 29.

[73]Id. at 64-65.

[74]Id. at 64; Parriott, supra note 7, at 101 n. 238, 239.

certain areas of Antarctica that, based upon the discovery theory of territorial sovereignty, could have been at least as valid as any of the seven claimant nations.[75] Indeed, a variety of expeditions that were either private, "covert", or officially sanctioned by the United States after 1924 could have served as the bases for such a claim.[76] The U.S. even went so far in 1939 as to authorize expeditions that were intended to support claims to territorial sovereignty, and purported to create evidence of some semblance of an effective exercise of sovereignty by planting U.S. flags, depositing claims sheets in cairns, and (as late as 1947) dropping claims papers during Antarctic overflights which were part of U.S. Navy training exercises (known as "Operation High Jump" and "Operation Windmill").[77] Despite the laying of such a

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[75]See notes 238-257, infra and accompanying text.

[76]Two expeditions by Admiral Byrd were significant in establishing an American presence in Antarctica. The first, between 1928 and 1930, established a base at Little America on the Ross Ice Shelf and carried out scientific work in the Queen Maud Mountains and flights to the South Pole and Marie Byrd Land. This expedition also claimed part of the area east of 150° W (the eastern boundary of the Ross Dependency). From 1933 to 1935 the Admiral's second private expedition worked in the same area expanding activities in Edward VII Land and Marie Byrd Land. Furthermore, Lincoln Ellsworth flew across the continent from Dundee Island in the Antarctic Peninsula to Little America in 1935, claiming the land between 80° W and 120° W for the United States as James W. Ellsworth Land. A further flight 240 miles inland in 1939 brought a claim to the area south of 70° S.in the Australian Antarctic Territory, covering 150 miles south, east and west of 70° E, which was the line of flight. Although Ellsworth's flights were private, his 1939 claim had the covert support of the Department of State. Auburn, supra note 1, at 62 n. 120-122.

[77]Id. at 62-63.

foundation, the United States never officially or publicly asserted any territorial claim to Antarctica. U.S. activities in Antarctica preceding the International Geophysical Year (1958) and the Antarctic Treaty in 1959 evidence the fact that the U.S. position may best be described as inconsistent:[78] while expeditions were commissioned to bolster[79] any claim the U.S. may make, no such territorial claim was ever perfected or asserted. The U.S. position has evolved into one of refusing to recognize the claim of any other nation in Antarctica, while simultaneously reserving its own "basic historic rights."[80] This rather anomalous position will contribute substantially to the inability of the United States to assert an effective territorial claim in Antarctica today or in the future.[81]

It may seem peculiar that the Soviet Union, a superpower traditionally and ideologically on the opposite side from the United States on many issues, is also a nonclaimant player in the Antarctica of today and tomorrow. Like the United States, the Soviet Union has never asserted an official claim to any portion of Antarctica; it also has reserved to itself the right to assert "all rights based on discoveries and explorations of Russian navigators and scientists, including the right to

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[78] Id. at 64.

[79] Parriott, supra note 7, at 101.

[80] Department of State in 'U.S. Antarctic Policy', Hearing, Subcommittee on Oceans and International Environment, Committee on Foreign Relations, Senate 94th Cong., 1st Sess. (1975), 18.

[81] See notes 263-68, infra; Auburn, supra note 1, at 65.

present corresponding territorial claims in the Antarctic."[82] This reservation of right based on discovery is very similar, historically, to the U.S. position. As will be examined later, it appears that the validity, strengths, and weaknesses of the Soviet claim, as well as its stake in Antarctica's future, also closely coincide with U.S. positions.

Historically, the Soviet claim to priority in the discovery of Antarctica passes to the Soviet Union by succession from Russia.[83] It is claimed that the Russian explorer Bellingshausen was the first man to sight the Antarctic continent, on 27 January 1820, and that any rights of territorial sovereignty based upon the discovery theory could be founded on his expedition.[84] Although such sighting has been roundly attacked because of insufficient evidence, it is important because if any right in Antarctica could accrue due to discovery, this first sighting could arguably give priority rights to the Soviet Union. In light of this, it is doubtful that the Soviet Union will retreat from this position.[85]

The problem with any potential Soviet claim to, or in, Antarctica based upon discovery is the same that plagues all such claims: the concept of effective occupation within a

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[82]Boczek, The Soviet Union and the Antarctic Regime, 78 AJIL 834 (1984), at 843.

[83]Id. at 843 n. 36.

[84]Id. at 843.

[85]Auburn, supra note 1, at 78.

reasonable period.[86] In the Soviet case this requirement must be particularly distressing in that after Bellingshausen, there was no further Russian or Soviet activity in Antarctica for the next 125 years.[87] Even under the more relaxed standards for effective occupation which emerged from the celebrated Eastern Greenland, Island of Palmas, and Clipperton Island cases in 1933, 1928, and 1932, respectively,[88] a gap of more than 100 years between contacts is generally not considered to be a reasonable period.[89] Perhaps a realization that this is a relatively slender reed upon which one might be forced to build a discovery theory claim for Soviet Antarctic presence could be seen in one Soviet public assertion in 1981 that, although the Soviet Union could claim "very considerable territorial rights" on a historical basis, "it has not done so in the interests of peace."[90] At any rate, the Soviet Union rejects what it considers to be an "imperialist" doctrine of effective occupation as affecting its rights in Antarctica and views

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[86]See notes 263-68, supra.

[87]Auburn, supra note 1, at 78 n. 222.

[88]Legal Status of Eastern Greenland, 1933 PCIJ, ser. A/B, No. 53; Island of Palmas Case (Neth. v. U.S.0, 2 R. Int'l Arb. Awards 829 (1928), reprinted in 22 AJIL 867 (1928); Clipperton Island Case, 2 UNRIAA 1105 (1932). These cases and the principle of effective occupation will be more fully analyzed in a later section of this thesis.

[89]Boczek, supra note 82, at 841.

[90]Id. at 841 n. 39.

discovery alone, without subsequent abandonment or renunciation of those rights, as being determinative.[91]

It is at this point that a difference between the U.S. and the Soviet approach to the "question of Antarctica"[92] can easily be made. While still refraining from any assertion of an Antarctic territorial claim, the Soviet Union has proceeded to continually expand its Antarctic presence since 1946. It has been said that the modern Soviet campaign for involvement in Antarctica basically began with a February 10, 1949 Resolution of the All-Soviet Geographical Society which asserted the "indisputable and historic right of the Soviet Union to participate in solving the Antarctica problem."[93] With the establishment of its first base at Mirny in 1956, the Soviet Union has increased its investment in Antarctic expeditions and base construction to the point where it is now (behind the United States) maintaining the second largest Antarctic presence.[94] While it may initially have been the U.S. interpretation of Soviet involvement that the Soviet Union was motivated only by a desire to earn the right to participate

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[91]The Soviet Union appears to apply this rationale selectively. Its argument regarding Antarctica is not officially endorsed with regard to the Arctic region. See Boczek, supra note 82, at 842.

[92]See note 62, supra.

[93]Boczek, supra note 82, at 837.

[94]R. Scott, "Protecting United States Interests in Antarctica", LL.M. Thesis, U.S. Army Judge Advocate General School (1988), 32.

in any future legal regime for Antarctica,[95] it is now theorized that the steady expansion of Soviet activities is more in line with enhancing the validity of making any future territorial claim if the current Antarctic Treaty becomes ineffective or is terminated.[96] It is interesting to note that the Soviet Union now operates seven permanent all-year stations in Antarctica, and the Soviet presence appears to be strategically located in all sectors of Antarctica, including the area which could (and has) arguably been referred to as the "American sector".[97] The Soviet Union has traditionally demonstrated a major interest in the development of Antarctic resources, and by 1982 had developed one of the largest and most obviously resource-oriented geological research programs in Antarctica.[98] When its economic interests are combined with its unparalleled experience in polar technology[99] the Soviet Union's program appears to be one designed to secure the best possible bargaining basis for that nation in any future allocation of mineral rights.[100]

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[95]Boczek, supra note 82, at 842; Auburn, supra note 1, at 82.

[96]Id.; Id.

[97]Auburn, supra note 1, at 81.

[98]Mitchell, The Southern Ocean in the 80s, 3 Ocean Y.B. 379 (1982).

[99]Auburn, supra note 1, at 79.

[100]Mitchell, supra note 98; Boczek, supra note 82, at 847.

The difference, then, between the U.S. and the Soviet positions in Antarctica appears to be in the direction in which each one has been going. The U.S. Antarctic program, while still the largest, arguably has peaked in terms of its number of scientific bases, and has in fact abandoned or relinquished control over some of its installations since the 1950s.[101] The Soviet Union, on the other hand, has continually expanded its presence, both geographically and economically.[102]

III. THE ANTARCTIC TREATY AND ITS PROGENY

The development, history, and effect of the Antarctic Treaty are of great importance in any analysis of the

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[101]In 1957, the United States made the decision to reduce costs in the Antarctic program: Ellsworth Station was handed over to Argentina and Wilkes to Australia, both considered allies. A year later United States officials felt that it was to America's national benefit that the Belgian station be maintained without assistance from the nearby Soviet expedition. In both instances friendly nations were seen as surrogates for the United States. But the activities of the three countries concerned, especially the two claimants, could not support American territorial rights. Auburn, supra note 1, at 83.

[102]The Soviet Union transferred the Oazis Station on the coast of the Australian Antarctic Territory between Mirny (Soviet Union) and Wilkes (United States) to Poland in January 1959. It is currently maintained by Poland as an austral summer installation, but if the base becomes permanent, the territorial position of the Soviet Union, with its main base (Mirny) and an inland station (Vostok) in the sector, will be unimpaired. Sixteen years later Poland set up the permanent Arctowski Station on King George Island, a few miles from Bellingshausen (the only Soviet base in the Antarctic Peninsula). The Soviet Union clearly does not regard allies as surrogates for its Antarctic interests. Not only has it continuously extended its sphere of interest, but it has also directly challenged the United States by establishing a base in the 'United States sector' and working on the Dufek Massif. Id.

territorial claims issue in Antarctica. The Treaty itself has been considered as a successful adaptation to the general absence of legislature, courts, and police in the international legal system,[103] and as an "alternative, pragmatic model of international law",[104] coming at a time when the absence of a solution to the "Antarctic question" posed a serious threat to world stability. Shortly before, and during, World War II, the strategic importance of the Antarctic territory was recognized and the interest in either acquiring new territory or in securing already established "stakes" became of heightened international interest and tension.[105]

The Antarctic Treaty was based on a lengthy international dialogue which was predicated on a 1948 U.S. proposal attempting to minimize friction and potential conflicts between overlapping claimancies in Antarctica.[106] To curtail any

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[103]Burton, supra note 5, at 425.

[104]Id.

[105]Hambro, Some Notes On the Future of the Antarctic Treaty Collaboration, 68 AJIL 217 (1974).

[106]During the Antarctic summer seasons of 1946-47 and 1947-48 Argentina and Chile sent naval expeditions into the British-claimed area known as the Falkland Islands Dependencies. The greater part of the latter is also claimed by Argentina and Chile. The U.K. formally protested against Argentine and Chilean "acts of trespass." These two governments, in their several replies, rejected the British assertion and also the offer of the U.K. to submit the entire question of conflicting Antarctic claims to the International Court of Justice. Hanessian, The Antarctic Treaty 1959, 9 INT'L. & COMP. L. Q. 436 (1960), n. 1.

"scramble for Antarctica",[107] the United States proposed first a trusteeship arrangement under Articles 75, 76, 77, and 79 of the Charter of the United Nations,[108] and followed up on this general concept (after its rejection by the international community) with an idea to internationalize Antarctica as a multiple condominium, separate from the United Nations but still maintaining liaison with it.[109] Neither initiative succeeded, but a solution was still needed. Despite the diversity of nations which professed a serious interest in Antarctica, several common interests prevailed. Arguably the major area of common interest was the preservation of a continental environment conducive to freedom of scientific research.[110] Another major common interest was concerning strategic considerations: After the International Geophysical Year, it was clear that the Soviet Union intended to be a key player in any Antarctic scenario. It was also clear that, with international tensions aggravated by the Cold War, the concept of a Soviet military presence in Antarctica posed a significant threat to the United States and its allies.[111] With this in mind, the demilitarization of Antarctica seemed to be an

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[107]See Washington Post editorial, "Antarctic Claims," January 2, 1947 and New York Times correspondence, February 26, 1947, "Antarctic Sovereignty," Id., n. 2.

[108]Hanessian, supra note 106, at 437.

[109]Id. at 438.

[110]Id.

[111]Burton, supra note 5, at 475.

efficient means to negate any Soviet military threat to the Southern Hemisphere from an Antarctic base.[112] While Soviet interest in demilitarization has been the source of varied speculation,[113] it is believed that at least one factor promoting demilitarization is that, by removing Antarctica from the arena of strategic rivalry, all parties concerned could cut fiscal outlays from potential Antarctic defense projects and reallocate budget priorities accordingly.[114]

A third area of common concern was dictated by the reality of world politics at the time. Of the twelve participants in the International Geophysical Year, ten were allied with the United States by security treaties[115] and extensive political, historical, and economic ties.[116] None of this group was interested in introducing an area of conflict which might undercut these relationships. Indeed, even the non-allied nations (Soviet Union and, to a lesser extent, the Union of South Africa)[117] had a strong interest in reducing world friction and removing Antarctica from the field of international discord: the resultant effect was that, for whatever variety existed in individual national interests, the

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[112] Id. at n. 214, 215.

[113] Id. at 476.

[114] Id.

[115] Id. at 477 n. 217.

[116] Id. at 476.

[117] See note 115 supra.

collective sense was that "Antarctica shall not become the scene or object of international discord."[118]

Perhaps the key fact to be gleaned from the pre-Treaty negotiations and discussions is that the Soviet Union was never included, despite U.S. insistence that all interested parties be allowed to participate.[119] One factor cited for this seemingly glaring omission was the "background stress" created by East-West tensions in Berlin in 1948,[120] but it was not long thereafter that the Soviet Union entered the stage. In a U.S.S.R. Memorandum on June 9, 1950, addressed simultaneously to the governments of Argentina, Australia, France, Norway, New Zealand, the United Kingdom, and the United States, the Soviet Union essentially stated that in accordance with "international practice" any consultation concerning the future of Antarctica must allow the Soviet Union to participate, due to its being an "interested party in an area of international significance", warning that the Soviet Government could not recognize as legal any decision on an Antarctic regime in which it did not participate.[121] While this Soviet Memorandum did not generate

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[118]Hanessian, supra note 106; Antarctic Treaty Preamble.

[119]Id. at 439.

[120]Id. The author specifically refers to the Soviet land blockade of Berlin and the subsequent launching of the joint U.S.-U.K. "Berlin airlift" on June 26, 1948 as an incident which made it impossible to consider Antarctic negotiations with the Soviet Union at that time.

[121]Id. at 446.

much official response at the time,[122] it certainly declared Soviet interest and depth of concern for future Antarctic discussions.

Prefaced by a lack of agreement on Antarctica and the increasing severity of international incidents,[123] and undoubtably buoyed by the successful international cooperation

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[122]Several of the claimant governments expressed serious concern in regard to the Soviet wish to participate in an Antarctic agreement. Most were strongly inclined to reject the Soviet assertion that she had a "right to attend" because of her "historic" interest in the area. The general feeling was that only States having a "legal" title or right should be entitled to participate. Only Argentina (and Chile, by means of a public statement) replied to the Soviet memorandum. In parallel statements the two countries categorically rejected any "right" of the U.S.S.R. to claim territory or to participate in a discussion of Antarctic problems, and reaffirmed the validity of their own territorial claims. The other interested States agreed with the United States view that there was "nothing to be gained" by replying to the Soviet memorandum. Id. at 446-47.

[123]On February 1, 1952, an Argentine party in Hope Bay opened fire with a machine gun over a British landing party attempting to occupy a Falkland Islands Dependencies station which had been destroyed by fire in 1948. Diplomatic correspondence regarding this incident, which could "only be regarded as an excess of zeal in the defence of the national territory" by Argentina is in the Polar Record, Vol. 7, No. 48, July 1954, pp. 212-226. Id.

The resumption of interest by Chile was in connection with her efforts to settle another incident, this time involving conflicting Argentine-British-Chilean claims to Deception Island in the South Orkneys, south of the tip of South America. The incident occurred in February 1953 when British forces destroyed Argentine and Chilean huts on one part of the island and removed Argentine personnel. News of this incident reached Chile and Argentina when President Peron was in Chile on a good-will visit, a fact which allowed close co-ordination of the responses of the two countries to the British action. The protests were nearly identical, and both countries also rejected the standing British offer to take the dispute to the International Court. Id., at 447-448.

during the International Geophysical Year (July 1957-December 1958),[124] the birth of the Antarctic Treaty truly commenced in 1958 with an initiative proposed by the British Foreign Office which revived the U.S. "consortium" proposal of 1948-49 but, just as importantly if not more so, included the Soviet Union.[125] Combined with the fact that the "gentlemen's agreement" of the International Geophysical Year to shelve all political activity concerning Antarctica would end in December of 1958, the time was ripe for reaching an agreement. The next U.S. proposal in May, 1958, included the following major points:

> (1) free access to Antarctica by all nations interested in carrying out scientific research; (2) the growth of scientific co-operation and exchange of information and data among the participating nations; (3) the use of Antarctica for peaceful purposes only; (4) non-militarization of the area; (5) guaranteed rights of unilateral access and inspection by all participating States to all parts of Antarctica; (6) the freezing of the legal status, so no one need renounce any claims or rights currently held; and (7) the creation of an administrative unit in which all participating States would have an equal footing.[126]

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[124]The International Geophysical year (IGY) was a cooperative effort lasting 18 months during 1957 and 1958 with scientists representing 67 countries. The goal of the IGY was to gather data for scientific analysis and assessment. See generally S. Chapman, IGY: YEAR OF DISCOVERY (1959); Joyner, supra note 51, at 704 n. 75.

[125]Hanessian, supra note 106, at 452.

[126]Id. at 456.

This plan differed from the 1948 proposal by including the basics of Chile's "Escudero Declaration" of 1948 (which essentially called for the establishment of a modus vivendi arrangement for five years, during which all claims and rights in territory south of 60° South latitude would be frozen and scientific cooperation encouraged)[127] and by calling for non-militarization coupled with an inspection system. The initiative, along with an invitation to attend a treaty conference, was delivered to all other participants in the IGY activities in Antarctica,[128] thus acknowledging at least tacitly the existence of a valid Soviet interest in Antarctica's future. While several nations voiced some concern with certain parts of the U.S. proposal,[129] these differences were not of such magnitude as to hinder future discussion. By June 4, 1958, all eleven nations had agreed to participate in the proposed treaty conference.

Sixty preparatory meetings were held between June 13, 1958 and October 13, 1959 to discuss, informally and confidentially, the specific wordings of the draft treaty provisions.[130] Despite numerous problems basically generated by sovereignty

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[127] Id. at 440 n. 20, at 441.

[128] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, and the United Kingdom.

[129] Hanessian, supra note 106, at 457-461.

[130] Id. at 461.

and economic concerns,[131] the desire to effect an agreement resulted in considerable progress, culminating in the meeting of the Antarctic Treaty Conference in Washington, D.C. on October 15, 1959.

The conference delegates worked very quickly, conducting

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[131]Hanessian referred to several serious problems that hindered progress toward agreement:

(1) strong national feeling in Argentina and Chile. Although both were agreeable to further scientific co-operation in Antarctica and that the region should be used only for peaceful purposes, both were opposed to any relinquishing of their claims. The September 1958 election campaign in Chile also complicated the question, as the Washington Antarctic discussions were an explosive topic;
(2) the reluctance of Australia, Argentina and Chile to accept any proviso for an international administrative body;
(3) opposition to the principle of demilitarization, with its corollaries of inspection and control;
(4) disagreement on the zone of application for the treaty;
(5) the question of economic exploitation;
(6) membership in the treaty conference. Although the U.S.S.R. and Japan pushed for the widest possible participation, Australia asked for a limited group. The United Kingdom was agreeable to the accession of a wide range of States to a general agreement, but wanted a limitation in the number of countries involved in the actual administrative arrangements. The United States suggested that the treaty participants be kept to the minimum of the twelve States, since it felt that even that number would prove cumbersome in the actual treaty preparations. Some nations felt that India should be asked to participate because of its United Nations proposals. Others felt that if India were invited to join that the U.S.S.R. would bring in one or more of the satellite States. Id. at 462.

discussions in private deliberations.[132] Major areas of contention during the drafting sessions centered around (1) the area of geographical delimitation; (2) matters of jurisdiction and settlement of disputes; and (3) the provisions governing accession to the Treaty. By mid-November a key agreement was reached on an inspection system to assure against unauthorized military activity.[133] Preliminary agreement was also, perhaps surprisingly, reached on the banning of all nuclear explosions on the continent: this area was sought to be avoided in the Treaty by both the U.S. and U.S.S.R., but its inclusion was demanded by the Southern Hemisphere nations.[134]

After six weeks of intensive negotiations and numerous meetings, the Final Act and the completed Treaty were both signed in Washington on December 1, 1959, following the fourth plenary session. The Treaty as originally established designated its twelve original signatories as Consultative Parties, and seven of these were claimant nations.[135] Described as one of the most important international agreements signed by all the "great Powers" since World War II,[136] the

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[132] Id. at 466.

[133] Id. at 467.

[134] Id.

[135] Joyner, supra note 51, at 704 n. 82. The claimant states are Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom.

[136] Hanessian, supra note 106, at 468.

Treaty specifically outlaws military activity,[137] nuclear explosions,[138] and the disposal of radioactive wastes in the continent,[139] while calling for the promotion of scientific cooperation.[140] Perhaps most importantly for the purposes of this paper, Article IV of the Treaty "freezes" the subject of territorial claimancy in Antarctica, effectively suspending determination of the validity of any national claims.[141] The importance of this Article will be addressed infra. The Treaty has been cited by the Soviet Union as "a noble mission in the interest of all"[142] and as "probably the best example in history of politicians and diplomats being drawn into action by scientists",[143] on the assumption that it was the success of international scientific collaboration during the International Geophysical year that provided impetus to the treaty conference.

Through its consultative party arrangement, the Antarctic Treaty establishes regulations for conduct on Antarctica. Under Article IX of the Treaty, consultative parties shall include the original twelve signatories and any other acceding

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[137]Antarctic Treaty, supra note 53, art. I.

[138]Id. art. V.

[139]Id.

[140]Id. art. III.

[141]Joyner, supra note 51, at 704.

[142]Boczek, supra note 82, at 856.

[143]Hambro, supra note 105, at 218.

party which "demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition."[144] The consultative and acceding parties will meet from time to time to exchange information, consult on matters of common interest, and recommend to their governments measures to further the principles and objectives of the treaty. Such recommendations become effective when approved by all of the contracting parties entitled to participate in the meetings.[145] Presently, eight nations have joined the original signatories as consultative parties: Poland (1979), the Federal Republic of Germany (1981), Brazil (1983), India (1933), the People's Republic of China (1985), Uruguay (1982), Italy (1987), and the German Democratic Republic (1987).[146] Seventeen more nations have acceded to the Antarctic Treaty without achieving consultative party status: Austria, Bulgaria, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Ecuador, Finland, Greece, Hungary, the Netherlands, Papua New Guinea, Peru, Republic of Korea, Romania, Spain, and Sweden.[147] Since the entry into force of the Treaty on June 23, 1961, Antarctica has, by and large, been a continent maintained in accordance with the principles of

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[144]Antarctic Treaty, supra note 53, art. IX.

[145]Id.

[146]Scott, supra note 94, at 18.

[147]Id.

"peaceful purposes, non-militiarization, and scientific cooperation" embodied in the Preamble and Article I of the Treaty. Although the Treaty deals with the issues of sovereignty, demilitarization, scientific collaboration, and conservation, it specifically does not purpose to provide a solution to any economic problem, present or potential. While it has been noted that the treaty conference might have been wise to lay down some general rules for exploration and possible exploitation,[148] purely practical considerations stressing the need for the rapid conclusion of a successful treaty conference may have won out.[149] Indeed, it is submitted that the noninclusion of potential economic issues and proposed solutions thereto may prove to be one of the most important features behind the Treaty's viability.

Concerning the issue of territorial claims, the most important provision of the Antarctic Treaty is Article IV, which "freezes" not only territorial claims but also the basis upon which any state may make such claims in the future.[150]

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[148]Hambro, supra note 105, at 221.

[149]Id.

[150]Id. at 219. Article IV of the Treaty states:

> 1. Nothing contained in the present Treaty shall be interpreted as:
> (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
> (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica

Perhaps crucial to this section's importance is its prohibition, in Article IV(2), of the assertion of either any new claim or any enlargement of an existing claim during the time the Treaty is in effect.[151] While there is some controversy over what, if anything, either parties or non-parties to the Treaty may do under this Article and still not be in violation of the Treaty,[152] it remains true now, as it was at the time the Treaty became effective, that the specific structure of Article IV was necessary to accommodate the numerous divergent interests of the consultative nations. While the basic conflict between the claims to territorial sovereignty and the claims to open use are felt to be irreconcilable under traditional notions of international law

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> which it may have whether as a result of its activities or those of its nationals in Antarctica or otherwise;
>
> (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
>
> 2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

[151] Id.

[152] Burton, supra note 5, at 477.

and legal method,[153] the Treaty did succeed in at least establishing some law, particularly between the parties, in other than economic matters. The beauty of Article IV was that, in preserving the legal status quo, neither claimants nor nonclaimants were forced to compromise their positions: the freeze left the juridical positions of the parties to further resolution, if and when necessary, and afforded the parties a modus vivendi based on what has been called the technique of "deliberate ambiguity,"[154] examples of which can be found in nearly all articles of the Treaty. In its freezing of claims/bases for claims, the Treaty may not have lived up to some earlier hopes that, as a result of the Treaty, the claims issue might die a natural death,[155] but it has succeeded in putting a major source of international conflict in the background and "on hold" for a relatively long period of time. The question that now presents itself is whether or not the Treaty and its deliberate ambiguity will be able to maintain its validity, effectiveness, and acceptance as the basis for a legitimate Antarctic regime.

The discussion now turns to the validity of the Antarctic Treaty regime, which perforce requires an examination of the position of the Antarctic Treaty in international law. There can be no question that, as between the consultative and

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[153] Id. at 478.

[154] Id.

[155] Hanessian, supra note 106, at 470.

acceding parties (collectively referred to as contracting parties) to the Treaty, the Treaty is international law and thus binding on all parties.[156] The more intriguing question is whether or not the Treaty is binding on non-parties. While a major Soviet textbook on international law had once expressed the opinion that the Antarctic Treaty must be considered valid erga omnes (essentially, binding on all),[157] this position is considered to be in the minority and has basically been repudiated by the majority of commentators as well as by the leading Soviet international lawyer, Professor Tunkin, who represented the Soviet Union at the 1959 Antarctic Treaty Conference in Washington, D.C.[158] A number of attacks have been made on the legality of the Antarctic Treaty and its subordinate agreements (collectively characterized as the Antarctic Treaty System)[159] insofar as they purport to

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[156]Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031 (1945), T.S. No. 933 (effective Oct. 24, 1945) [hereinafter U.N. Charter or Statute of the ICJ, as appropriate].

[157]Boczek, supra note 82, at 856 n. 145.

[158]Simma, The Antarctic Treaty as a Treaty Providing For an "Objective Regime", 19 Cornell Int'l. L.J. 189 (1986).

[159]It is beyond the scope of this paper to attempt to deal extensively with the four subordinate agreements, namely the Agreed Measures for the Conservation of Antarctic Fauna and Flora, adopted June 2-13, 1964, [1966] 11 U.S.T. 991, 996 T.I.A.S. No. 6058, the Convention for the Conservation of Antarctic Seals, adopted June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826, the Convention on the Conservation of Antarctic marine Living Resources, done May 20, 1980, T.I.A.S. No. 10,240 (entered into force Apr. 7, 1982) and the recent Convention on the Regulation of Antarctic Mineral Resources, adopted at Wellington, N.2. as the Final Act of the Fourth Special

establish control over the continent[160] and keep such control limited to members of the "Antarctic Club."[161] Adopting the position that the Treaty was not valid erga omnes, in 1964 the "Group of 77", composing a majority voting bloc of developing countries within the United Nations,[162] initiated the concept of the "New International Economic Order" (NEO),[163] which postulated that a redistribution of world wealth was in order (from industrialized nations to developing countries) to promote a more equitable allocation of economic resources. This theory gained greater acceptance, and increased adherents (including some developed countries),[164] in the early 1980s after a similar concern for economic equity arose with the prospect of deep seabed mining becoming a reality for several

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Antarctic Treaty Consultative Meeting on June 2, 1988 and to be opened for signature for one year, beginning November 25, 1988. They are merely listed here for convenience and reference. Their existence, however, and in particular the existence and specifics of the 1988 Convention on the Regulation of Antarctic Mineral Resources, will be dealt with more extensively in a later section.

[160]Parriott, supra note 7, at 88.

[161]Simma, supra note 158, at 209.

[162]Kindt, supra note 34, at 41.

[163]Id. at 41 n. 94. The doctrine of the New Economic Order was promulgated in the Declaration on the Establishment of a New International Economic Order (New Economic Order Declaration), G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974). The New Economic Order Declaration was to be implemented by the Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, S-6 U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9559 (1979).

[164]Id. at 41.

industrialized nations. The NEO has been strongly supportive of the notion that all world resources beyond national jurisdiction should be the "common heritage of mankind" and not subject to national appropriation: finding its roots in 1967 in a speech by the Honorable Mr. Arvid Pardo, Ambassador from Malta, to the United Nations General Assembly where it was then declared that the wealth of the oceans should be the "common heritage of mankind,"[165] it was a relatively simple step to extend such rationale to the continent of Antarctica where, even amongst the consultative parties, there was sharp disagreement over Antarctica with regard to its status as terra nullius or terra communis.[166] Accordingly, the NEO could easily provide support for the "open use" principle advocated by the non-claimants in Antarctica and not be inconsistent with its "common heritage of mankind" approach to future resource exploitation. Based upon the results of the Third United Nations Conference on the Law of the Sea in 1973 and its resulting 1982 Convention on the Law of the Sea (LOS Convention),[167] an argument could be made for the similar resolution of the future of Antarctica, consistent with "common heritage" principles.

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[165] 22 U.N. GAOR, C.1 (1515th mtg.) 1, U.N. Doc. A/C.1/PV.1515 (1969); see U.N. Doc. A/6695 (1967); U.N. Doc. A/AC.135, at 27 (1967).

[166] See notes 50-61, supra, and accompanying text.

[167] Done Dec. 10, 1982, reprinted in 21 I.L.M. 1261, U.N. Doc. A/CONF.62/122 (1982) [hereinafter LOS Convention].

Another attack that arose from non-Treaty nations was one criticizing the validity of all territorial claims in that such claims were the vestiges of a colonial era whose time had long since passed and, more importantly, had been replaced by the decolonization of the modern world.[168] The colonial premise for territorial claims was seen as discredited, as were the theories of discovery, military superiority, and territorial contiguity.[169] Antarctica, lacking a native population, was argued to be an environment analogous to the high seas and deep seabed, and thus amenable to the common heritage approach and belonging to the international community as a whole.[170] A parallel analysis was made asserting the invalidity of any claims to either a territorial sea, exclusive economic zone, or continental shelf rights, and suggesting a preemption of any such claims by the provisions of UNCLOS III.[171]

Based on an initiative by Malaysia, the "question of Antarctica" was included on the agenda of the U.N. General Assembly in 1983. This move was viewed with concern by the Treaty parties, and seen by many as a challenge to the validity of the Antarctic "regime" (i.e., the administration of the continent in accordance with the Treaty and its subordinate

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[168]Hayashi, The Antarctica Question in the U.N., 19 Cornell Int'l. L.J. 275 (1986), at 280.

[169]Id. at 280 n. 28-30.

[170]Id. n. 31.

[171]Id. at 281, at 281 n. 36.

agreements).[172] It became incumbent upon the Treaty nations to justify the validity of the Treaty regime, or to at least prepare a collective defense.

Non-treaty nations are strongly challenging the Antarctic regime. These nations want a share of the potential resources of Antarctica without having to assume the costs of Treaty membership. They refuse to accept the present territorial claims, are against any third-party-effect of the Treaty, and oppose the bi-level participation structure in the Treaty ('nur wer kann, darf", or, "only those who can, may"). These nations are trying to renegotiate the Antarctica regime in the United Nations.[173]

In this regard, probably the most substantial assault upon the regime has been on its control of decision-making in Antarctica. Decision-making power is conferred upon the twenty Consultative Parties--the twelve original parties to the Treaty and the eight states that have acceded to the Treaty and have acquired the status of Consultative Parties. Consultative Party status is conferred through unanimous recognition by existing Consultative Parties that the acceding nation has conducted substantial scientific research on the continent. Non-Consultative Parties do not enjoy decision-making power. The negotiations on the proposed mineral resources regime were

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[172]Id. at 277; Colson, U.S. Position in Antarctica, 19 Cornell Int'l. L. J. 291 (1986), at 299; Kindt, supra note 34, at 44.

[173]Simma, supra note 158, at 208.

also restricted to the Consultative Parties as far as decision-making was concerned.

During the U.N. debates, Malaysia took issue with the distinction between Consultative and Non-Consultative Parties, contending that it was undemocratic, going "against the grain of current international reality," since the requirement of "substantial scientific research activities" in Antarctica goes beyond the means of most states. Other developing nations expressed similar dissatisfaction.[174] Perhaps most to the point in this criticism was Malaysia's questioning "whether any group of countries should confer upon itself the moral and legal right to self-selected determination or management of Antarctica."[175]

Despite the criticisms of the Antarctic Treaty system, there exist a number of factors which support its legitimacy to administer Antarctica under international law. Even its critics have acknowledged the success of the Treaty regime in scientific cooperation and research, non-militarization, and the preservation of the continent for peaceful purposes.[176] There exists some thought that, whatever the validity vis-a-vis non-parties the Treaty may or may not have, the Antarctic regime is "morally and legally" called upon to ensure the

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[174]Hayashi, supra note 168, at 222 n. 46.

[175]Id. n. 47.

[176]Hayashi, supra note 168, at 278; Simma, supra note 158, at 209.

establishment of a minerals regime consistent with the principles and purposes of the Treaty.[177] To impose a "legal" requirement, and thus an obligation, on the Treaty parties arguably implies the acknowledgement of a right to take the actions necessary to carry out and administer that obligation in the fulfillment of the duty.

Additionally, it appears that any challenge mounted by the United Nations against the validity of a pre-existing treaty (here, the Antarctic Treaty) would fall short of success. This position has been espoused by Professor Kindt, who concludes that the basic legal principle of formulating treaties - pacta sunt servanda - is certainly valid, and is especially so when the treaty in question is open to any nation wishing to become a party. While a nation may claim a de jure-de facto distinction concerning consultative party status, the fact remains that basic membership is still open to technologically-unsophisticated countries. Furthermore, he reasoned, there is nothing in international law which would prohibit such a two-tiered system, the most obvious example of the validity of such being the United Nations' system itself.[178] Several other factors point to the validity of the Treaty itself under international law: neither the Vienna Convention on the Law of

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[177] Id.

[178] See Kindt, supra note 34.

Treaties (Treaty on Treaties)[179] nor the Restatement (Second) of Foreign Relations Law[180] authorize a third party or group of third parties to challenge the validity of an existing treaty. It can be argued, in fact, that nothing precludes any rule set forth in a treaty from becoming binding upon a third party as customary international law, when recognized as such.[181] In light of the foregoing, it can be argued that the Treaty either embodied customary international law at the time it took effect or, perhaps more persuasively, that since 1961 the Treaty provisions have become recognized (most strongly, for lack of protest and/or acquiescence) as customary international law and thus are now binding on non-parties as well as parties.[182] An analysis under Article 38 of the Statute of the International Court of Justice supports this rationale. Assuming as a basic premise that the sources of international law are:

a. international conventions,
b. customary international law,
c. the general legal principles of civilized nations, and
d. the teachings of publicists who expose the law,[183]

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[179]Id. at 45 n. 124; Opened for signature, May 23, 1968, U.N. Doc. A/CONF.39/27 (May 12, 1969), reprinted in 8 I.L.M. 7679 (1969).

[180]Id. at 46 n. 125.

[181]Id. at 46 n. 126.

[182]Id. at 46.

[183]ICJ, supra note 156.

as soon as the Antarctic Treaty and any subsequent treaties on Antarctic resources enter into force, the law embodied in the Antarctic Treaty system undoubtedly constitutes not only international law per se, but also the primary "source" of international law relating to Antarctic areas. With regard to the second source of international law, persuasive arguments could be made that the international agreements comprising the Antarctic Treaty system: (1) reflected customary international law when they were negotiated, (2) codified the existing customary international law when they entered into force, (3) were subjected to little or no challenges over long periods of time, and (4) ripened over time to become customary international law.[184]

It has been consistently maintained by the consultative parties that the administration of Antarctica under the Treaty has been not only valid under international law but also just, reasonable, and effective.[185] The basis for this position has been founded in both principles of international law and in considerations of equity.[186] Despite the attacks on the Antarctic Treaty System and its administrative regime, it has so far been a success and its existence appears to have an

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[184]Kindt, supra note 34, at 61.

[185]Hayashi, supra note 168, at 283.

[186]Equitable considerations have been specifically cited in defense of the Antarctic Treaty regime by Chile and the United Kingdom. Id.

adequate foundation in international law to establish its legitimacy.

IV. THE PRESENT TERRITORIAL CLAIMS PROBLEM

To present the issue as the present territorial claims problem is somewhat misleading, because it is not so much a question of the existence, validity, or present effect of territorial claims as it is a question of the cumulative effect of, and potential for, territorial claims in Antarctica's future. The problem, however, is one of the present because the Treaty itself, by freezing the claims/rights to claims issue in 1961, did not resolve the situation so much as it held it in abeyance.

It would be an understatement to say that the world of today is not the world of 1961. It has been the total spectrum of changing world conditions, and specifically the increased competition for resources, which has heightened international awareness of Antarctica's economic potential and has made the issue of the control of both real and potential Antarctic resources a major international concern. The Antarctic Treaty may have resolved the issue of territorial claims at its time, but in its not addressing economic resource issues,[188] the "problem" still exists and has in fact been aggravated with the passage of time.

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[188] See note 148, supra.

There are several factors which have led to a call for the reassessment of the Antarctic Treaty regime. The emergence of the NEO,[189] with its resistance to anything that looks like colonialism, is certainly a major factor. In a similar fashion the Group of 77's position on deep seabed mining at UNCLOS III and its promotion of the "common heritage of mankind" idea also call into question the validity of a minority of nations exercising total control over a whole continent which, depending on your position, is either terra nullius or terra communis.[190] Despite some important distinctions between the deep seabed and Antarctica,[191] the general concept of global

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[189]Discussed at notes 162-65 supra, and accompanying text. See also Pinto, The International Community in Antarctica, 33 Miami L. Rev. 475 (1978), at 480.

[190]Burton, supra note 5, at 501.

[191]This distinction has been made:

> The principal factual difference, of course, is that Antarctica is a continent, not seabed. Even the Antarctic continental shelf differs in important ways from the deep seabed. in Antarctica, claims to territorial sovereignty have been made and the right to make such claims in the future has been reserved by several states. Moreover, these claimed rights derive from substantial investments in Antarctica over a period of decades, premised in part on the possibility of acquiring territorial sovereignty. No such basis exists for any activities undertaken on the deep seabed.
>
> The most significant difference may be a legal one. No basis exists for believing that any nation had Antarctica in mind when voting for the LOS Convention and its Declaration of Principles even though the words of the resolution can be applied logically to Antarctica. One surely cannot suppose that such logic would lead any state to forego its claimed national rights in Antarctica. An

sharing has not fallen into international disfavor[192] but has, if anything, gained momentum.

Another major factor has been the fast-growing belief that Antarctica's living and nonliving resources may be worth much more than previously imagined. Times have definitely changed since the day when a famous geologist declared that he "would not give a nickel for all the resources of Antarctica."[193] It has been said that no other activity undertaken in Antarctica today has posed a threat to territorial claims comparable to the threat posed by minerals exploitation.[194] This feeling must be amplified when living resources are added to the equation, and when such a major threat is posed to the territorial claims issue it is necessarily of equal importance to the future of the Antarctic Treaty regime. While the extent of Antarctic resources is difficult to assess, it can at least be said that abundant supplies of living resources are available. From a commercial standpoint, the most promising among them is krill (Euphausia superba). Krill are small

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> interpretation of the resolution as applying the principle of the common heritage to Antarctica bears no relationship to the genuine shared expectations of states at the time of adoption or thereafter. The resolution, lacking intent, therefore has no effect in Antarctica. Id., at 501 n. 275.

[192]Parriott, supra note 7, at 94.

[193]Testimony of Mr. Laurence Gould, Hearing before the Committee on Foreign Relations, U.S. Senate, 86th Congress, 2d Session, June 1960.

[194]Francioni, supra note 54, at 179.

shrimp-like crustaceans rich in protein. The Southern Ocean supports a standing stock of krill estimated between 153 million and 6.6 billion metric tons, of which 30 million to 1 billion metric tons could be harvested annually without adverse effect. Considering that the total fish catch worldwide is approximately 60 to 70 million tons annually, Antarctic krill constitute a major potential food source. Although numerous practical problems remain to be solved before it becomes economically profitable, large-scale krill harvesting is already technologically feasible.[195] Krill has been of special interest to the Soviet Union, which has pioneered krill fishing, research, technology, and marketing.[196] Relatively abundant stocks of seals, whales, fish, cepalopods (octopus/squid) and cetaceans also exist in the Antarctic regions.[197]

Speculation about the existence of mineral resources, both onshore and offshore, in Antarctica has fueled a major interest in both resource exploitation and allocation. While traditional minerals such as coal, copper, lead, gold, nickel, silver, platinum, and uranium are known to exist in

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[195]Parriott, supra note 7, at 72 n. 26-32.

[196]For more than 10 years (1961-1971), the Soviet Union was the only krill-fishing nation; it was later joined by Japan, Poland, West Germany, Chile, Taiwan and a few other states. Boczek, supra note 82, at 847.

[197]Parriott, supra note 7, at 72-73.

Antarctica,[198] the main interest is in the possible existence of large supplies of hydrocarbons (deposits of oil and natural gas).[199] It has been estimated that for the Ross, Weddell, and Bellingshausen Seas around Antarctica there are 45 billion barrels of petroleum and 115 trillion cubic feet of natural gas, based upon surveys made in 1973 by the U.S. research vessel GLOMAR CHALLENGER.[200] Even though such hydrocarbon exploitation is still no more than a potential,[201] it has raised serious questions about the inevitable pollution accompanying hydrocarbon retrieval and the resultant danger to the fragile Antarctic environment. The 1988 Convention on the Regulation of Antarctic Mineral Resources (hereinafter 1988 Convention) represents an attempt to address this issue, but in that it is a part of the Antarctic Treaty System it begs the question to state that the 1988 Convention is a valid effort under international law to administer the problem. Its validity outside the sphere of the Treaty parties (assuming, for the moment, that the 1988 Convention is in fact made effective by the signature of sixteen consultative parties

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[198] Id. at 74.

[199] Id. at 75; Boczek, supra note 82, at 850.

[200] Auburn, supra note 1, at 244-45.

[201] Convention on the Regulation of Antarctic Mineral Resources, supra note 159.

after November 25, 1988)[202] must rise or fall with the validity of the Antarctic Treaty itself.

Other potential resource issues that have developed in Antarctica since 1961 are, while comparatively minor, still factors in the total picture of economic potential that have contributed to the need to reassess the U.S. position concerning the Antarctic Treaty regime in general and the issue of territorial claims in particular. One "21st century" project[203] is the possible harvesting of icebergs as a means to provide fresh water to the more arid regions of the world. Another is the recovery of manganese nodules from offshore. While the Antarctic nodules have proven generally to be of poorer quality than those found near the equator,[204] they are a retrievable mineral resource whose economic potential cannot be dismissed.

Increased attention to several other aspects has also brought the legitimacy of the Antarctic Treaty regime into the international spotlight. The advances in modern technology, both for scientific and economic purposes, since 1961 have

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[202] Id. art. 62. As of November 26, 1988, nine nations (Brazil, Finland, South Korea, Norway, South Africa, Sweden, USSR, Uruguay, and New Zealand) had signed the Convention. Washington Post, Nov. 26, 1988, at A20, col. 1.

[203] Parriott, supra note 7, at 75.

[204] Id. at 74. A manganese nodule is a small, potato-sized object basically containing commercially interesting qualities of nickel, copper, cobalt, any manganese. See generally FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR (D. Horn Ed. 1972).

certainly provided great impetus to this issue. It is believed that the technology of Arctic offshore developments in oil and gas exploitation can be transferred to the Antarctic region, with some modification, to make hydrocarbon resource recovery an economic reality.[205] Successful efforts in the Arctic have already been made at towing small icebergs, with technology used for protecting Arctic oil rigs and drilling gear from passing icebergs.[206] The value of Antarctica for scientific purposes has always been recognized, and has increased since scientists have begun using Antarctica as a standard of comparison for the detection of interplanetary life.[207] While "pure" scientific research is often difficult to distinguish from related economic exploration and/or research, it is nonetheless another force exerting pressure on the Antarctic regime.

Historically, the strategic significance of Antarctica has been minimal, apparently more dictated by negative concerns of blocking any other nation's attempts to gain an advantage in Antarctica than by affirmative motivation to actively include Antarctica as part of an overall national security plan. This

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[205]Auburn, supra note 1, at 248. In the next two or three years, Norway expects to develop the technological capability to drill on the very deep contitental shelf. Parriott, supra note 7, at 109.

[206]Attempts to transport icebergs of even a moderate size are only in the experimental stage. When a 292,000 ton berg was harnessed off Eastern Canada, it appeared to be a case of the iceberg towing the ship. Id. at 249 n. 52.

[207]Id. at 1.

has been particularly so of the United States, and apparently that of the Soviet Union as well.[208] The same approach cannot be said to have been followed by Chile and Argentina (and, possibly, Australia) whose relative proximity to Antarctica gave rise to more tenable security interests,[209] but the potential of conflict in this regard seems to have been put on hold by the Treaty. Back in 1948, the U.S. Joint Chiefs of Staff stated that Antarctica had no strategic value at all.[210] It is submitted that this position is easily subject to change, depending upon the volatility of the world political situation, any increase in small-scale armed conflict, and in no small measure upon the termination of the Antarctic Treaty: all the original (1959) "negative" strategic concerns would resurface and most probably be aggravated by an Antarctic "land rush" to establish and/or strengthen territorial claims.[211]

The potential for Antarctic habitation, once unthinkable due to the harsh environmental conditions on the continent, has also increased with time and technology. Chile and Argentina have traditionally maintained settlements on the Antarctic Peninsula, with continuing efforts to make these areas as much

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[208] See generally Boczek, supra note 82.

[209] Auburn, supra note 1, at 55-61.

[210] J. Myhre, THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY (1986), at 26.

[211] Id. at 27. For an interesting analysis of a similar problem during the California Gold Rush, see Umbeck, A Theory of Contract Choice and the California Gold Rush, 20 J.L. & Econ. 421 (1977). Burton, supra note 5, at 496 n. 121.

a part of the mainland as possible[212] and to raise international cognizance concerning the strengths of their respective interests in the continent. Currently, thirteen nations and one nongovernmental organization (Greenpeace) operate year-round stations with "winter over" personnel on the Antarctic continent. Several nations, including the United States, the Soviet Union, Argentina, Australia, Chile, and New Zealand, make extensive use of their military forces, in accordance with the Treaty,[213] to support their scientific and research missions.

The United States has consistently maintained the largest program in Antarctica. It operates three year-round stations: McMurdo (formerly Naval Air Facility, McMurdo until 1961), the logistics center on Ross Island; Amundsen-Scott, at the geographic South Pole; and Palmer, on Anvers Island off the western coast of the Antarctic Peninsula. Also operational are three austral-summer camps: Siple Station, in Ellsworth Land, at the base of the Antarctic Peninsula; Byrd Surface Camp, in Marie Byrd Land; and Marble Point Camp.[214] The U.S. Antarctic program, while heavily dependent on U.S. military logistic

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[212] Id. at 13; Auburn, supra note 1, at 59-61. In response to a private Brazilian venture planning an expedition to the Antarctic Peninsula, the President and Cabinet of Argentina flew to Argentina's Marambio Base in Antarctica, proclaiming the base to be the temporary capital of Argentina and conducting government business there as a show of sovereignty. Id.

[213] Antarctic Treaty, supra note 54, art. I.

[214] Scott, supra note 94, at 30-31.

support, is funded and controlled by the National Science Foundation, an independent U.S. government agency. Additional support is provided by the government of New Zealand pursuant to a joint cooperative agreement on Antarctic operations.[215] It is clear that the technology and facilities now exist to make Antarctica an area subject to year-round habitation. Such habitation may be, if not required, at least conducive to efficient economic exploration and exploitation in the future. As resources exploitation becomes a reality, so does the concept of Antarctica being amenable to being called "home", at least by some.

Finally, the growing concern with Antarctica is inextricably tied to the burgeoning interest in the law of the sea and, particularly, in the resource exploitation of the seas and the deep seabed. Assuming arguendo that UNCLOS III and its LOS Convention reflect principles of customary international law in the treatment of the territorial sea, the high seas, the continental shelf, the contiguous zone, and the exclusive economic zone,[216] the "law of the sea" presupposes the existence of a coastal state in order to exercise legislative and/or enforcement authority at sea.[217] The problem, of course, is that the Treaty freezes the issue of territorial

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[215] Id.

[216] See Oxman, The New Law of the Sea, ABA Journal vol. 69 (Feb. 1983), at 156-62.

[217] Oxman, Antarctica and the Law of the Sea, 19 Cornell Int'l L. J. 211 (1986), at 222.

sovereignty by nonrecognition and thereby technically negates any coastal state claims in Antarctica. Thus, the traditional notions of coastal state authority are nonexistent there. Although the LOS Convention did not purport to extend its jurisdiction to Antarctica,[218] and the pre-existing Treaty applies to all activities south of 60° South latitude (excepting high seas freedoms and activities seaward of the Antarctic continental shelf),[219] the terra nullius/communis controversy again surfaces to question the validity of any Antarctic Treaty regime assertion of jurisdiction in offshore matters. An argument can be made that if Antarctica were considered res communis, instead of terra nullius, the Antarctic area would not be subject to appropriation by states because the entire area would by definition lie beyond the limits of national jurisdiction: under Article I of the LOS Convention, the term "Area" is defined as "the sea bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction." Thus, the continental shelf of Antarctica would become part of the "Area." By analogy, the Antarctic continent could also be considered part of the "Area." The Southern Ocean surrounding Antarctica would accordingly become "high seas" under the LOS Convention. The application of the LOS Convention to the Antarctic area as res communis would therefore result in the International Seabed Authority (ISA)

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[218]Parriott, supra note 7, at 94 n. 194.

[219]Oxman, supra note 217, at 236.

regulating Antarctica and the Antarctic continental shelf, and in the Southern Ocean being designated as high seas.[220] The potential for resource exploitation off the coast of the Antarctic continent and the NEO movement toward "global sharing" demand a resolution concerning the control of Antarctic offshore resources. The Group of 77, opposed to any appearance of colonialism, would not be happy with the prospect of being cut off from the economic benefits of Antarctica by the maintenance of the status quo in Antarctica which, while not specifically addressing economic concerns, leaves all decision-making to the consultative parties.[221] Neither, it might be added, would this prospect be satisfactory to any other non-consultative parties. As the demand for a share of these resources increases, the inability of the present Antarctic administrative regime (as presently structured) to accommodate these demands becomes more evident. This potential conflict may be even more aggravating in the offshore areas than on the continent itself due to the relatively greater ease of access to offshore resources.[222] As Professor Oxman sagely points out, the underlying juridical question here is whether a certain number of nation-states may, under international law, establish a regulatory regime in Antarctica which binds all

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[220]Parriott, supra note 7, at 96.

[221]Antarctic Treaty, supra note 53, art. IX.

[222]See Kindt, note 34 supra; Auburn, note 1 supra; Parriott, note 7 supra; Burton, note 5 supra.

other states.[223] Oxman postulates that the absence of territorial sovereignty by any one state is not necessarily dispositive of the question of whether a suitable group of states may exercise collectively the off-shore rights that international law normally vests in the coastal state, and suggests that certain states (in this case, the consultative parties) have collective rights applicable erga omnes to establish regulatory regimes for both the Antarctic continent and the offshore areas that, under international law, would otherwise be subject to coastal state jurisdiction, even if no consultative party has perfected a sovereignty claim over the land territory in question, in accordance with the established doctrine of condominium: whatever the merits of the parties' claims inter sese, their rights collectively are superior to those of the rest of the world. Oxman also suggested that this collective authority could be rooted in the theory that the parties, given their historic role in Antarctica, have a special collective responsibility to establish such a regulatory regime, particularly in light of the elaborate duties imposed by the new law of the sea to conserve living resources and to protect and preserve the marine environment.[224] This theory highlights the basic rationale for the Antarctic Treaty regime as it currently exists: its validity, as Professor Oxman concedes, is dependent upon one's

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[223]Oxman, supra note 217, at 223.

[224]Id. at 223; see also Kindt, supra note 34, at 54.

view of the status of the land areas from which such jurisdiction is measured,[225] thus returning us full circle to the initial question of the legitimacy of the Antarctic Treaty regime. Many nations will not accept this condominium approach,[226] and whereas in 1961 the issue of the control of Antarctica does not appear to have been the concern of a majority of world nations, it presently is a major international issue due, in general, to the passage of time, scientific/technological advances, and in particular to the increased awareness of the utility and value of Antarctica in relation to basic international needs.

V. U.S. OPTIONS CONCERNING THE TERRITORIAL CLAIMS PROBLEM

At the present time the U.S. finds itself in a position where the protection of its interests in Antarctica is coming under increasing attack, both from outside the treaty regime as well as from within. As the potential for living and mineral resource exploitation become more of a reality, the need of those nations with a real or expected stake in Antarctica to protect their individual interests has increased the potential for international conflict. Sovereign nations within the Treaty regime will be forced to ensure their current investments in the continent are not washed away either by the expiration of the Treaty or by application of the principles of

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[225] Id. at 236.

[226] Auburn, supra note 1, at 117-120.

UNCLOS III, and those nations not members of the "Antarctic Club"[227] will make every effort to gain a piece of Antarctica's economic pie, either as a result of international acceptance of the "common heritage" concept vis a vis Antarctica or, in the alternative, of successfully asserting that Antarctica was, and still is, terra nullius, that the Treaty prevented any inchoate territorial claims from ripening, and that therefore all sovereign nations will now be able to make a territorial claim in Antarctica: indeed, a successful corollary to the above argument may be that, since non-parties are not bound by the "freeze" provisions of Article IV,[228] any non-party could in theory stake its claim to Antarctica as soon as it could get there (for some nations, that may mean immediately). Even if it is conceded that the Treaty parties have a "special relationship" with Antarctica,[229] this relationship is merely one of the bargaining chips that will be brought to any negotiating table. It is apparent that a crucial stage in both the economic and political development of Antarctica is imminent, and it is time to consider what changes and adaptations are necessary in U.S. Antarctic policy to safeguard the future of the United States stake in the continent.

While U.S. Antarctic policy leading up to the Antarctic

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[227]Simma, supra note 158, at 209.

[228]Antarctic Treaty, supra note 53.

[229]See notes 223-24 supra and accompanying text.

Treaty may have been inconsistent,[230] the most recent post-Treaty pronouncements have indicated a growing movement to protect U.S. interests.[231] The position of the United States in three general areas regarding Antarctica has been summarized as follows:

> A. POLITICAL AND SECURITY INTERESTS
>
> --to reserve Antarctica for activities that serve peaceful purposes only;
>
> --to prevent Antarctica from becoming the scene or object of international discord;
>
> --to continue the peaceful and cooperative relationships regarding Antarctica among those States active there;
>
> --to preserve United States access to all areas of Antarctica and surrounding marine areas for peaceful purposes, regardless of territorial or other claims; and
>
> --to preserve any basis for a United States claim to territorial sovereignty in Antarctica that existed prior to the entry into force of the Antarctic Treaty.
>
> B. ENVIRONMENTAL AND SCIENTIFIC INTERESTS
>
> --to protect and maintain the Antarctic environment, including the ecological systems of the continent and southern ocean;
>
> --to increase understanding of the role natural processes play in Antarctic phenomena of global significance, including biological, geological, geophysical, meteorological, and oceanographic processes;

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[230]Parriott, supra note 7, at 104-05. Parriott's article does imply that Antarctic policy still vacillates with the political winds, but the evidence indicates to this writer a major policy shift when compared with pre-Treaty policy.

[231]Id.

--to increase scientific understanding of global processes that can be better understood as a result of evidence available in Antarctica (e.g., worldwide dispersal patterns of man-introduced pollutants and upper atmosphere physics);

--to increase baseline data and information on marine and terrestrial areas within the Antarctic Treaty area; and

--to maintain the freedom of scientific research in Antarctica and the cooperative sharing of data gathered in accordance with the Antarctic Treaty.

C. RESOURCE INTERESTS

--to increase knowledge of the living resources in Antarctica and their ecological systems;

--to conserve the living resources of Antarctica and the southern ocean ensuring the health of individual populations and their ecological systems;

--to participate in the development and implementation of management mechanisms for conserving the living resources of Antarctica;

--to provide access for United States nationals to harvest living resources, in accordance with agreed conservation objectives and measures, should such harvesting interests develop;

--to increase knowledge of the non-living resource potential of Antarctica and of the environment in which such resources may be located;

--to ensure that any mineral resource activities are environmentally acceptable;

--to facilitate an increase in the global supply of mineral resources through:

(a) defining rights to Antarctic mineral resources; and

(b) ensuring reasonable conditions of investment consistent with United States interests; and

--to provide non-discriminatory access for the United States to all areas of Antarctica in which

mineral resource activities may be determined acceptable.[232]

Numerous options concerning the future administration of Antarctica have been proposed. An excellent summary of these options has been prepared by Dr. W.E. Westermeyer,[233] and his in-depth analysis of the alternatives is enlightening. For the purposes of this paper, however, U.S. options are seen as choices between three basic plans:

1. Whether the United States should assert a territorial claim in Antarctica;

2. Whether the United States should promote United Nations administration of Antarctica; or

3. Whether the United States should support, with any necessary modifications, the continuation of the Antarctica Treaty regime.

A. Making a U.S. Territorial Claim in Antarctica

It has been urged in some quarters that the time has come for the United States to make a territorial claim in Antarctica.[234] The rationale for this position is based upon the application of a balancing test to U.S. Antarctic interests: preserving Antarctica for peaceful purposes only and preventing Antarctica from becoming the scene of international discord on one side, and U.S. environmental, economic, and historical (read: "territorial") interests on

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[232]Colson, supra note 172, at 291-93; Id. at 291 n. 1.

[233]W. Westermeyer, THE POLITICS OF MINERAL RESOURCE DEVELOPMENT IN ANTARCTICA (1984).

[234]Parriott, supra note 7.

the other.[235] This view assumes that the effectiveness of the Antarctic Treaty itself, and of the Antarctic Treaty system, cannot protect the above-listed U.S. interests in light of the increased awareness, and evidence, of the value of Antarctica's potential wealth of living and mineral resources. The espousal of such a position would first require that the U.S. withdraw from the Treaty in accordance with Article XII, or allow the Treaty to lapse after 30 years.[236] The suspect wisdom of this approach will be discussed later, but at first glance there does appear to be some basis upon which a U.S. territorial claim based upon discovery may arguably be made. A major drawback to the validity of any territorial claim that the United States may make in Antarctica has been that, as discussed earlier,[237] discovery without effective occupation has created at best inchoate title to the land in question and, unless perfected within a reasonable time, this title would be

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[235] Id., at 115.

[236] Antarctic Treaty, supra note 53, art. XII(2)(a). If the Treaty were allowed to lapse, its earliest potential termination date would be 1993. The Treaty is eligible for review in 1991, having come into effect in 1961. See Parriott, supra note 7, at 112.

[237] See notes 36-40, supra. In the nineteenth century, colonization in Africa and North America led to the acceptance of the theory that discovery and actual occupation should be required for the acquisition of territory and that symbolic annexation was no longer sufficient to confer title. Occupation and settlement, "more or less permanent," under state sanction was required, and possession must be actual, continuous, and useful. Article 35, Chapter VI, of the Act of Berlin was used as the authority for this test. Auburn, supra note 1, at 11-12, n. 58-61.

ineffective against other claimants who had exercised acts of sovereignty there. This traditional view, however, was effectively relaxed in three legal decisions: The Island of Palmas case,[238] The Clipperton Island Award,[239] and the Legal Status of Greenland case.[240] These cases stand for the proposition that an exception to, or relaxation of, the traditional rule of effective occupation is to be made when the land is essentially uninhabited,[241] and that effective occupation in an uninhabited area is accomplished merely by "effective administration."[242] In the Island of Palmas case, the dispute concerned an island located between the Philippines and the Dutch West Indies over which both the United States and the Netherlands claimed jurisdiction. The U.S. claim to title was derived from Spain by way of cession under the Treaty of Paris.[243] The original Spanish claim had been based on theories of discovery and contiguity. The Dutch claim was founded on an assertion of peaceful and continuous display of authority over the island. The arbitrator ruled that manifestations of sovereignty could not be exercised in fact at every moment on every point of a territory and that all that

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[238](1932) 2 UNRIAA 1105.

[239](1928) 2 UNRIAA 829.

[240](1933) PCIJ Serv. A/B, No. 53, 22.

[241]Parriott, supra note 7, at 81.

[242]Id. at 82 n. 104.

[243]Note, 9 Case W. Res. J. Int'l. L. 135 (1977) at 150.

was required in uninhabited regions was for such manifestations to be intermittently displayed.[244] Subsequent to the Island of Palmas case, Mexico and France both claimed jurisdiction over a small island located several hundred miles off the coast of Mexico. French claims of sovereignty over the island were based on relatively minimal acts of effective occupation. These included a proclamation of sovereignty over the island, an unsuccessful attempt by a French vessel to land there, and a protest to the United States following the discovery of a group of Americans collecting guano on the island. The Mexican case was based on a claim of Spanish title through discovery, said title later being inherited by Mexico through independence. The arbitrator decided that even if a historic right existed, it had not been continued by any subsequent act of Mexican sovereignty. He found the island to be terra nullius and that the French acts had been sufficient to gain sovereignty over the island, despite the absence of any attempts to occupy it.[245] Both cases were disputes over small islands with little or no native population. Essentially, in both cases effective occupation was accomplished by taking occasional steps to exercise administration: nothing further, for all practical purposes, was required.[246] Finally, in the Legal Status of Eastern Greenland case, a sovereignty dispute arose in a

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[244]Note 239, supra, at 877.

[245]Note 243, supra, at 151 n. 96.

[246]Parriott, supra note 7, at 84.

situation more closely analogous to the Antarctic scenario. Both Norway and Denmark claimed the eastern coast of Greenland, an area largely uninhabited.[247] Denmark claimed that its exercise of sovereignty over Greenland had existed traditionally, had been continuously and peacefully displayed, and, until this present dispute, had not been contested by any other state. It further argued that Norway was estopped from denying Danish sovereignty over the island because Norway had accepted various treaties in which Danish sovereignty was recognized. Norway contended that Denmark exercised no actual sovereignty over the area which Norway had occupied on July 10, 1931, and that at the time of the occupation, the area was terra nullius. It claimed that the area lay beyond the boundaries of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of these colonies.[248] Norway also claimed that attempts made by Denmark to obtain recognition of her position in Greenland were inconsistent with a claim to be already in possession of the disputed area, and that she was therefore estopped from alleging a long-established sovereignty over the whole island.[249]

The Court, in holding for Denmark, did not use the test developed in the Palmas case but referred to a title derived

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[247]Note 240, supra, at 84.

[248]Id. at 44.

[249]Id.

from a "continued display of authority."[250] This title involves two elements, each of which must be shown to exist: The intention and will to act as sovereign and some actual exercise or display of such authority.[251] The Permanent Court of International Justice (PCIJ) held that by its acts Denmark had established "effective occupation" over the entire areas.[252]

This trilogy of cases provides an argument that the relaxed test of effective occupation, particularly as applied in the Eastern Greenland case, could be applied to test the validity of territorial claims in Antarctica due to its uninhabited status at the times of various "discoveries" and subsequent expeditions. Both land areas are extremely large, relatively uninhabited, and generally inhospitable: accordingly, the PCIJ's rationale for relaxing the requirements for establishing effective occupation in the Greenland context might similarly be applicable regarding Antarctica. Sovereignty is, of course, generally exercised over people. However, in largely uninhabited areas there seems to be no valid reason for requiring actual settlement and possession of the territory. Rather, all that is necessary reasonably to establish occupation is effective administration. Assuming a state that effectively administers a territory retains the

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[250] Id. at 45.

[251] Id.

[252] Id.

ability to guarantee some degree of minimum legal order and protection over the territory, it should not be required of that state to demonstrate a physical possession of every portion of that territory.[253] Acceptance of this theory would undoubtably justify a U.S. assertion to Antarctic territory, based upon the early U.S. expeditions to Antarctica and subsequent acts, symbolic and real, both of administration and of intent to make a claim.[254] If, as Professor Auburn states, in disputes (between two parties over Antarctic territory) "the more active side should prevail,"[255] it appears that the United States, with traditionally the largest Antarctic operation in the world, would generally be in an advantageous position to claim superior territorial rights.[256]

Other grounds for the assertion of a U.S. territorial claim in Antarctica exist. It can be argued that while Article IV of the Treaty purportedly "froze" all claims (and any basis for claims) in 1961, there is nothing in the Treaty prohibiting the U.S. from using activities, or bases established prior to 1961, as a basis for a claim: additionally, those U.S. activities from 1961-1993 that continued a preexisting base or activity/expedition would also be a viable basis for a

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[253]Parriott, supra note 7, at 86-87.

[254]See notes 66-80, supra, and accompanying text. See generally Auburn, supra note 1, at 61-78 for a concise history of U.S. presence in Antarctica.

[255]Auburn, supra note 1, at 14.

[256]Parriott, supra note 7, at 117.

territorial claim since they would not be "new" claims under Article IV; similarly, assuming Treaty termination, activities conducted after the termination date that essentially continued the occupation of bases established either before or after 1961 could theoretically form the basis for a claim and, in reality, it would be irrational to presume that any sovereign nation would be inclined to surrender its "investment" (bases) in Antarctica merely because the Treaty ended.[257] It can also be argued that, given the termination of the Treaty, modern technological advances have now made it possible to finally achieve "effective occupation" in Antarctica (whereas such may not have been generally possible before 1961) and that, assuming arguendo no title could have been perfected prior to 1961 (due to lack of technology), and that all claims or rights to claims were frozen from 1961-1993, it is now possible to perfect the inchoate claims (or rights to claims) that previously existed.[258] That the door would be open to assert a U.S. territorial claim upon withdrawal from or termination of the Treaty is clear from the fact that, unless otherwise required to do so under international law, the U.S. would no longer be bound to fulfill any obligation contained in the Treaty.[259] Accordingly, the U.S. (and any other nation) would be free to make territorial claims.

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[257]Auburn, supra note 1, at 107.

[258]See generally Conforti, supra note 41.

[259]Parriott, supra note 7, at 91 n. 178.

If a territorial claim were asserted by the United States, such action theoretically might secure access for the U.S. to potential Antarctic resources within the U.S. claimancy. Under what has been called a "national model" for Antarctic jurisdiction, the U.S. along with any other state claiming a historic interest in Antarctica would assert its own territorial claim.[260] Conceding that this could potentially produce international conflict, this model nevertheless might provide certain advantages by allowing each claimant nation to assume "sound resource management" and conservation.[261] Additionally, this approach can be seen as an equitable "reward" for the historically developed interests of those nations which have taken an active role in Antarctica from the beginning by allowing them to profit from their early "investments."[262]

Unfortunately, any superficial appeal of making a "land grab" in Antarctica is outweighed by a multitude of negative aspects that would be associated with such an action. Initially it must be noted that the "relaxed" theory of occupation as the basis for a legitimate territorial claim has numerous critics. The Eastern Greenland case is not seen as relevant precedent for the Antarctic scenario because it allegedly did not specifically address the "effective

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[260] Id. at 98.

[261] Joyner, supra note 51, at 720.

[262] Id. at 720-21.

occupation" issue but instead limited its decision to a finding that no states had opposed Denmark's claim to the island and that the Danish claim had in fact already been conceded in many multilateral and bilateral agreements. Accordingly, it is distinguishable from the Antarctic situation in which no claims are conceded and nonrecognition of claims is the norm.[263] Furthermore, the application of the relaxed standard for effective occupation to Antarctic claims may be questionable because (1) these tribunals only seek to determine which of the two parties to the proceeding has the better claim; and (2) all three cases upheld single claims to an entire island, thus obviating any need to draw boundaries.[264] In this light, it may be said that any territorial claim based on the aforementioned theory is illegitimate. It must be remembered that the United States would be only one of a number of nations that would be competing for territory in a "land rush" scenario and that, whereas for all practical purposes the potential claimants in Antarctica were relatively few in number in 1959, this pool of claimants has greatly increased, and will inevitably continue to increase, with technological advances and the passage of time. Acknowledging that a major impetus for the Antarctic Treaty was the imminence of international conflict in 1959,[265] one must concede that increased Antarctic

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[263]Conforti, supra note 41, at 256.

[264]Burton, supra note 5, at 463.

[265]Myhre, supra note 210, at 25-26.

interest by many nations at present would virtually guarantee a greater potential for conflict. It is most probable that any attempt by the United States to make a territorial claim would be seen by a majority of the rest of the world, and especially the NEO/Group of 77 community, as a continuation of the discredited notions of colonialism and roundly denounced.[266] The animosity created by such action would be compounded by friction within the Antarctic Treaty community, because any U.S. claim would undoubtably detract from or conflict with other Treaty members' interests, thus escalating international discord. At the very least, U.S. action in this regard would surely be considered as a major affront to the sovereignty of many nations already in Antarctica. Proponents of the "U.S. territorial claim" concept may not see armed international conflict as an inevitable result of such U.S. action (although the possibility of nothing more than "minor skirmishes" is acknowledged),[267] but such an approach appears to be too simplistic and overly cavalier. It is believed that a more realistic analysis of the probable consequences of the United States making a "land grab" will conclude that the intensely negative international political reaction makes such a course of action impossible. It has been said that "[it would have been] politically foolish to advance a claim [to Antarctic

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[266]Parriott, supra note 7, at 115.

[267]Id. at 118.

territory] in the late 1940s."[268] It is submitted that it would be even more foolish now to make such an assertion.

International political opprobrium is not the only disadvantage to be weighed in considering the possibility of making a U.S. claim in Antarctica. In asserting any territorial claim, the United States runs the risk of opening the territorial claims door to other nations which may very well have equal, or greater, claims on the continent. This is especially true in light of the U.S.'s inconsistent Antarctic claims policy through history. U.S. rights in Antarctica have been seen to "rest on shaky foundation", especially in light of the Hughes doctrine.[269] As one U.S. Government analysis stated:

> A U.S. claim could take one of several forms. Delineation of a U.S. claim to full sovereignty, even if we could identify our major interests at this time, might prove to be an abortive effort because of the lack of internationally agreed rules for acquiring sovereignty in the Antarctic. It would also be a sharp break with our past policy of refusing to recognize claims to sovereignty when not accompanied by occupation. More important, the principles underlying any selection of the precise areas of superior U.S. 'rights' would be applied elsewhere as a yardstick of comparison by other powers, possibly to our disadvantage. Inferior U.S. 'rights' outside the area of a 'sovereignty' claim would be impaired, at least by implication, even though they might eventually acquire significance as the result of further U.S. activities, or through default by other powers.[270]

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[268]Myhre, supra note 210, at 25.

[269]Auburn, supra note 1, at 75.

[270]National Security Council Statement of Policy (16 July 1954).

Any territorial claim the United States could assert would probably be in the area referred to as the "United States sector", encompassing what is known as Marie Byrd Land and Ellsworth Lands, and being the area between of 90° W. longitude and the boundary of New Zealand's claim over the Ross Dependency.[271] While this area may be tacitly recognized[272] as suitable for a U.S. claim, the problem in asserting a claim here is that this sector is considered the least valuable and least accessible of all Antarctic sectors, and a claim to this area might imply a renunciation of an Antarctic claim elsewhere.[273] Any further aggrandizement attempt (which would logically tend toward the Ross Dependency wherein the largest U.S. base and logistics center, McMurdo, is located) would infringe upon (and probably swallow) the New Zealand claimancy. As New Zealand is arguably the United States' best friend and principal ally in Antarctic operations,[274] such a move should be unthinkable.

Perhaps the largest problem that would be created if the United States were to open the door to Antarctic claims is the presence of the Soviet Union. Contrary to the history of U.S. Antarctic policy, Soviet history on the continent has been one

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[271]Auburn, supra note 1, at 67.

[272]Id.

[273]Id.

[274]Id. at 67-71.

of consistency and expansion.[275] The U.S.S.R., presently a nonclaimant state, has in many instances had mutual interests and objectives with the United States in Antarctica.[276] However this would certainly disintegrate over the issue of territorial claims since the Soviet Union, despite having no recognized Soviet sector, has established bases in all Antarctic sectors and is the leading nation in the exploitation of Antarctic living resources (most significantly, krill).[277] The Soviets have also developed perhaps the largest resource oriented geological research program in Antarctica and in support thereof have located its stations in areas of potential minerals interest.[278] The Soviet Union has continually taken advantage of its opportunities to strengthen the Soviet position for any future allocation of territory or mineral rights, and if the Treaty's current "freeze" of claims is jeopardized, it is clear that the Soviet Union would not sit idly by and acquiesce to U.S. action in any areas in which the Soviets expressed their own national interest. The same opposition can also obviously be expected from all other claimant states, although perhaps to a lesser degree. Thus, assertion of a territorial claim in Antarctica by the United States is seen to be not a cost-effective method to protect

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[275] See notes 92-102, supra and accompanying text.

[276] Boczek, supra note 82, at 857.

[277] Id. at 858.

[278] Id.

U.S. interests on the continent. The problem of the United States' historical inaction in this area has created, if not by some theory of equitable estoppel then by the passage of time, a situation in which the United States has painted itself into a corner. It cannot realistically assert a territorial claim without jeopardizing its overall national interests. A U.S. "land grab" would generate tremendous political denunciations on the international plane, and this disadvantage is severe in itself. However, when the problem of being an international pariah is compounded by the realization that the end result of a U.S. territorial claim would probably give the United States a claim to an area which at present it has little foreseeable use for (and perhaps never saw as worth claiming in the first place), it becomes apparent that the negative features of making a U.S. territorial claim in Antarctica far outweigh any positive aspects.

B. United Nations Administration of Antarctica

The second possible U.S. option for the protection of its interests in Antarctica is to let the administration of Antarctica be conducted under the auspices of the United Nations. This proposal will be split into two aspects because a corollary to the "U.N. management" concept is the reservation of the Antarctic continent as a "World Park", free from all commercial exploitation.

The "World Park" concept is an intriguing one. The concept basically posits that any mineral resource exploitation in Antarctica is unacceptable, and that the overriding concern is for the protection of the continent's fragile ecosystems from the damage and pollution resulting from commercial development.[279] The "World Park" idea is not a new one: it was first proposed by the United Kingdom at the First Consultative Meeting in Canberra, Australia, in 1961 with the idea being to declare Antartica a "nature reserve."[280] From the time of its first proposal to the present, the "World Park" theory has not been acceptable to the Consultative Parties,[281] but it is currently being strongly advocated by organizations such as Greenpeace International as a means to uphold the basic principles of the Antarctic Treaty system and to simultaneously ensure protection of the world environment.[282] Under this approach, a "World Park" has become especially necessary because of recent (1986) scientific discoveries indicating a rapid and substantial depletion of much of the ozone layer in the Earth's atmosphere over Antarctica.[283] This phenomenon, if unchecked, allegedly could produce drastic changes to life on

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[279]Myhre, supra note 210, at 100.

[280]Id. at 110 n. 5.

[281]Id. at 100.

[282]"ECO", Vol xxxix, nos. 1-3, 29 Oct. 86-11 Nov. 86, published in Tokyo, Japan by "Friends of the Earth International."

[283]Kindt, supra note 34, at 27.

earth: accordingly, Antarctica needs to be maintained as a "control area" for gauging worldwide environmental developments.[284] An additional factor supporting the "World Park" model is the hypersensitivity of the Antarctic environment to pollution in general and the relatively large destructive potential that even a small oil spill could have on the continent's ecosystems.[285] Besides the environmental benefits, Antarctica as a "World Park" is said to be a model that not only readily dovetails with the basic purposes of the Treaty but also promotes these values. It would certainly ensure the continued demilitarization of the continent and thereby stabilize the region in terms of security; it would promote international cooperation in pure research by removing the temptation to gear research toward economic exploitation, and probably most importantly would soothe the present tensions between members of the Antarctic "Club" and outsiders concerning the potential resource exploitation on the continent.[286]

It is submitted that the "World Park" concept is nice in theory but not applicable to Antarctica in reality. If there were no resource potential in Antarctica, this concept would have a much better chance of acceptance but, in the face of increasing international demands for alternative sources of

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[284] Id.

[285] Id. at 70.

[286] See note 282, supra.

food stocks, hydrocarbons, and hard minerals, and in light of the substantial historical, fiscal, and scientific investments which already exist in Antarctica under the Treaty, it is impractical to expect either the Treaty regime or non-Treaty nations to forego at least the ability to see for themselves that the potential of Antarctica is either nonexistent or not worth continued investment. At such a point in time, the "World Park" may be an acceptable alternative for Antarctica, but it makes little sense in the protection of U.S. interests to give up its current investment. There is another practical reason for not abandoning the U.S. investment as well: the interests sought to be preserved and protected by the "World Park" have already, for the past 27 years, been safeguarded (and adequately so) by the Antarctic Treaty regime, which has by consensus kept a close eye on Antarctica and on each of its members to protect the continental environment.[287] Under the present conditions, there is virtually no motivation for the United States to alter its present position and espouse the "World Park" concept. To do so would be to surrender its substantial decision-making power within the Treaty regime without any practical increase in benefits.

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[287]While some nongovernmental organizations may disagree with the position that the consultative parties are effective guardians of Antarctica, the general consensus is that the Treaty regime has been remarkably effective in conservation. See generally Hambro, supra note 105; Auburn, supra note 1. Cf. Antarctica Briefing, The Antarctica Project and Greenpeace International (1987).

A similar surrender of control and increased risk of investment would arise in the United Nations' administration of Antarctica, but before the impact of that possibility is assessed, it is necessary to examine the purported benefits of such a system.

U.N. management of Antarctica would be premised upon international acceptance of the theory that Antarctica and its surrounding area are the "common heritage of mankind" and thus are not subject to the appropriation of any nation or combination of nations.[288] Strongly advocated by the NEO (which again, for the most part, consists of developing third-world nations), international (U.N.) management and control of Antarctica would produce the benefits of true global sharing, equitable redistribution of wealth and resources, and reduction of world conflict by removing what this writer terms the "us v. them" conflict inherent in Treaty/non-Treaty party differences. Global sharing,[289] referred to as an inchoate political interest held by developing countries outside the Treaty system, emphasizes the values of participation in, or control of, economic negotiations by the developing countries.[290] It would arguably ensure that Antarctic resources would be primarily used in alleviating the severe starvation and malnutrition problems that currently exist in developing

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[288]See notes 165-68, supra and accompanying text.

[289]Burton, supra note 5, at 507.

[290]Id.

countries.[291] An added benefit of this approach is claimed to be that truly international management of Antarctica could be acceptable by applying the legal principle rebus sic stantibus[292] which essentially recognizes that, since international conditions have undergone an extensive transformation since 1959, a new regime is now needed to deal with these changes and reserve Antarctica and its resources as res communis, for the benefit of all mankind.[293] There have been a number of suggestions concerning the formation of this "global regime" in Antarctica: some observers would administer Antarctica as an international trusteeship under Article 81 of the Charter of the United Nations.[294] Others recommend an UNCLOS III-type arrangement with the Antarctic equivalent of the International Seabed Authority controlling mineral resource development.[295] Still another plan would have Antarctica administered by the General Assembly of the U.N. through a

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[291]Joyner, supra note 51, at 723.

[292]Id.

[293]Id. No state has asserted officially that Antarctica is terra communis. But see L. Bloomfield, Outer Space 123 (9168). The concept originated in Roman law as a counterpart to the terra nullius concept. The terra communis principle suggests that common ownership precludes use of appropriation of the area without the consent of the community. This concept has never been recognized in international law; its only analytical force is its logical, symmetrical relationship to terra nullius. Burton, supra note 5, at 463.

[294]U.N. Charter, supra note 156.

[295]Kindt, supra note 34, at 64; Hambro, supra note 105, at 225.

committee composed of all Treaty parties and fifteen other "geographically representative" states, up to a maximum of forty states.[296] There are others, but this "global regime" concept of universal participation is common to them all.

Even assuming the best of intentions in the United Nations, surrender of control of Antarctica from the Antarctic Treaty regime to the U.N. would not benefit U.S. interests. There are few, if any, practical reasons why any Treaty party, and particularly the United States, would support a global regime which necessarily treats all historic claims to an interest in Antarctica as null and void.[297] There is no valid reason for the United States to sacrifice its historical equity in Antarctica without any return. Applying the "common heritage of mankind" principle itself to Antarctica has a very tenuous legal basis,[298] and it is envisioned that any effort to

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[296]Pinto, The International Community in Antarctica, 33 Miami L. Rev. 475 (1978) at 483-86.

[297]Kindt, supra note 34, at 65.

[298]The "common heritage of mankind" principle is inappropriate in the Antarctic context. It is much easier to state the principle than to state the rationale behind its applicability to Antarctica. Application of the principle to Antarctica has been defended on the ground that there is a moral obligation on the part of the developed countries to preserve resources not yet under the jurisdiction of any country so that developing nations can also share in the exploitation of those resources. This argument, however, raises a question of fairness: Is it fair to require an investor who takes the full risk of exploiting a resource to share the benefits of that risky and costly investment? The "common heritage of mankind" principle has its roots in the political objective of developing nations to establish a new international economic order. The only common bond these nations share is their status as developing nations. Other

force U.N. management on the consultative parties would result in their mounting a concerted diplomatic, economic, and political offensive against such a plan.[299] If the international plan were to allow a developing country veto power over any U.S. activities in Antarctica, it would surely be objectionable. The same analysis would apply to any voting structure that allows developing countries the power to control access to Antarctic resources or to dictate resource distribution.[300] The United States within the Treaty regime is in a position (by means of the unanimity requirement of Article IX of the Treaty) to control what transpires in Antarctica. To surrender this position without any guaranteed benefits in return is untenable, and is not considered to be a viable U.S. option for the protection of its interests in Antarctica.

C. Continuation of the Antarctic Treaty Regime

Continuation of the Antarctic Treaty regime, with some modifications, is seen by this writer as the best option the United States has to protect its extensive interests in Antarctica now and in the future. Neither of the two (three, if one includes the "World Park" concept) previously discussed

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developing nations which are parties to the Antarctic Treaty, such as Argentina, Brazil, Chile, and India, clearly oppose any attempt to make Antarctica the "common heritage of mankind" because of their own vested interests in Antarctic. Parriott, supra note 7, at 120.

[299]Joyner, supra note 51, at 724.

[300]Burton, supra note 5, at 509.

options can afford similar protection at an acceptable cost. The emphasis on protection of U.S. interests may be criticized as being a parochial approach to this international problem, but it is believed that U.S. support for the continuation of the Antarctic Treaty regime will result not only in the protection of U.S. interests but also in the safeguarding of international concerns. The basic issue at the heart of the Antarctic problem is to fashion a regime acceptable to Treaty nations without privileging them to a degree unacceptable to non-Treaty states. This can be accomplished, as stated above, under the present Treaty regime (with some modifications) in two basic ways. Despite some criticism that the Treaty regime and its system of subordinate international agreements[301] are on their last legs[302] as an effective management plan for Antarctica, it is submitted that the development of the Antarctic Treaty system and its present survival as a management scheme is strong and credible evidence itself of the vitality of the system. The Treaty regime, by adoption over time of the Agreed Measures for the Conservation of Antarctic Flora and Fauna, the Convention of the Conservation of Antarctic Seals, the Convention on the Conservation of Antarctic Marine Living Resources, and the presentation of the newly-completed Convention on the Regulation of Antarctic Mineral Resources has clearly demonstrated that it is a system

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[301]See note 159, supra.

[302]Auburn, supra note 1, at 290-97.

with sufficient flexibility to allow for adjustment to changing circumstances. This flexibility has always been acceptable to U.S. interests.[303] Concededly, the requirement for unanimity may restrict the capacity to reach controversial decisions,[304] but this perceived roadblock has not yet been reached and merely because some restriction may exist it is not necessary to concede that an acceptable solution cannot be reached notwithstanding. The history of the Antarctic Treaty system has shown its ability to adjust despite the unanimity requirement. While the issue of mineral resource exploitation does pose a significant threat to stability, the mere existence of serious threat seems to be insufficient justification to move away from a proven problem-solving mechanism. Indeed, critics of the "Antarctic Club" concede both a moral and legal responsibility exists for the Treaty regime to ensure an establishment of a minerals regime in accordance with the principles and purposes of the Antarctic Treaty,[305] and despite NEO/Group of 77 pressure for the application of the "common heritage of mankind" principle to Antarctica, even these critics admitted the achievements of the Treaty and were not adverse to the modification of the Treaty regime as opposed to

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[303]The U.S. Congress has approved the separate conventions on flora and fauna, seals, and living resources with little opposition. Parriott, supra note 7, at 105 n. 233.

[304]Id. at 296.

[305]Simma, supra note 158, at 209.

creation of an alternative or parallel system.[306] The "good faith" administration by the Antarctic Treaty regime has been recognized,[307] and its present success cannot be denied. Vested interests exist in the maintenance of the Treaty regime on the part of the U.S., as well as on behalf of all other consultative parties, but political reality dictates that these interests will not, and in my opinion cannot, be exercised exclusively for the benefit of Treaty members. Such action would cause nearly as much international discord as the assertion of individual territorial claims. The need to accommodate non-Treaty nation concerns is valid, and is recognized by the United States as necessary to prevent a disruption of the Antarctic Treaty system.[308] The Antarctic Treaty system has been described as

> "a pragmatic formulation deprived of ideological connotations of any sort which enables it to sustain a continued process of compromise and adaptation to the changing realities relevant to the Antarctic."[309]

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[306]39 U.N. GAOR First Comm. (50th-55th mtg.), U.N. Doc. A/C.1/39/PV.50-55 (1984).

[307]Hayashi, supra note 168, at 278; Francioni, supra note 54, at 188.

[308]Colson, supra note 172, at 297.

[309]G. Triggs, THE ANTARCTIC TREATY REGIME (1987). The advantages of the Antarctic Treaty System have been summarized as follows:

> (a) It is open to accession by any Member State of the United Nations, or any country which may be invited to accede with the consent of the Consultative Parties -- it is thus as universal as the interest of States in Antarctica;
> (b) It is of unlimited duration and establishes

Assuming the validity of that description, it remains to be explored the manner in which the Antarctic Treaty regime may be modified to ensure both its continued validity and the continued protection of U.S. interests. This necessitates accommodating the interests of both Treaty and non-Treaty nations. There appear to be two basic models that could be conducted under the provisions of the Antarctic Treaty which would allow for adequate accommodation. One must first look at the two different models, and then consider some modification (again, in accordance with the Treaty) that would be required

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> Antarctica as a region of unparalleled international co-operation in the interests of all mankind;
> (c) It is based on the Charter of the United Nations, promotes its purposes and principles and confirms Antarctica as a zone of peace; it is, in fact, the only effective, functioning nuclear-weapons-free zone in the world today;
> (d) It excludes Antarctica from the arms race by prohibiting any measures of a military nature, such as the establishment of military bases and installations, the carrying out of military manoeuvres or the testing of any types of weapons, including nuclear weapons, and forbids the dumping of nuclear waste;
> (e) It encourages and facilitates scientific co-operation and the exchange of scientific information, which is made available for the benefit of all states;
> (f) It protects the natural environment of Antarctica, including the Antarctic ecosystem;
> (g) It provides for a comprehensive system of on-site inspection by observers to promote the objectives and to ensure compliance with the provisions of the Treaty;
> (h) It has averted international strife and conflict over Antarctica, inter alia, by putting aside the question of claims to sovereignty in Antarctica, thereby removing the potential for dispute.

Australia, "View of States", U.N. Doc., A/39/583 (Part II) 29 October 1984, at 85.

under either model to help make the balance of "us v. them" more acceptable to both sides.

The first model has already been discussed. This model looks to the flexibility of the Antarctic Treaty system as having been proven through history to be able to adjust to changing world conditions.[310] Since the Treaty can be modified or amended at any time,[311] it is a vehicle already in place to accommodate competing interests, both now and in the future. While the Treaty does not specifically speak to mineral resource exploration and exploitation, the new Convention on the Regulation of Antarctic Mineral Resources illustrates the ability of the system to attempt to deal with emerging issues. This is not to suggest that this 1988 Convention is an acceptable solution to all parties, nor even that it will ever come into effect. It is beyond the scope of this paper, and premature, to assess the effectiveness of the Convention concerning its ability to solve the mineral resources problem. The Convention can, however, stand as evidence of the responsiveness of the system and of the Antarctic Treaty regime's concern to maintain its validity not only for regime members but also for non-parties. It is probably fair to say that the Treaty system, in one form or another, will survive because of geopolitical reality: it is extremely unlikely that any Treaty nation, particularly the United States or the Soviet

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[310]See notes 136-155, supra and accompanying text.

[311]Antarctic Treaty, supra note 53, art. IX.

Union, will be amenable to any major change in the status quo of Antarctica. For all practical purposes, there is a strong convergence of interests between American and Soviet policy in Antarctica[312] and when both of these superpowers are on the same side of an issue, there does not seem to be much leverage available to less powerful nations to be able to do much about it, whether under the auspices of the United Nations or not. Perhaps more importantly, it is not just the United States and the Soviet Union that have vested interests in preserving the Antarctic Treaty system. The other contracting parties must be supportive of the continuation of the Antarctic regime because of their respective power within the "Club" (for consultative parties in particular) to control decision-making. The principle of "Antarctic community"[313] will be preferred by the present regime because the alternatives (territorial claims or U.N. control) are less than attractive.[314] If the Treaty nations cannot resolve Antarctic problems themselves and the Treaty system were to collapse, the door would in theory be open for the United Nations to step in, invited or not, to take measures necessary to preserve international peace and security.[315] Another factor pointing to a continuation of the

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[312]Boczek, supra note 82, at 858.

[313]Burton, supra note 5, at 473, at 497.

[314]See Sections V.A and B, supra and accompanying text; see also Harry, An Australian View, 21 Va. J. Int'l. L. 727 (1981).

[315]U.N. Charter, supra note 156, chs. VI, VII.

Antarctic Treaty regime is the severe disadvantages that a Treaty nation would face if it were to withdraw from the Treaty yet try to maintain its interest/investment in Antarctica: it is suggested that the political implications of such action would be extremely negative and would not be feasible in the majority of cases.[316]

Many strong arguments have been advanced for the establishment of some form of "condominium" arrangement in Antarctica. This second model could be accomplished under the Antarctic Treaty, and has the additional advantage of being acceptable under the "common heritage of mankind" concept.[317] As such, it would generally be possible to protect the interests of the Treaty parties while also making room for the interests of non-parties (specifically, NEO/Group of 77). Although some have criticized the condominium approach as being violative of Article IV of the Treaty in that it could be viewed as an enlargement of an existing claim[318] or, alternatively, that it is merely something akin to collective

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[316]Auburn, supra note 1, at 266-67.

[317]Francioni, supra note 54, at 172, at 188. Francioni goes so far as to say that the present Antarctic regime represents the only existing example of substantive implementation of the common heritage principle. He considers Part XI of UNCLOS III (regarding deep seabed mining) a "victim of the overly ambitious and burdensome bureaucratic apparatus that is to implement the . . . principle." Id. at 173.

[318]Marcoux, The Antarctic Continental Margin, 11 Va. J. Int'l. L. 374 (1971).

colonialism,[319] the better argument is that such an arrangement is valid under the Treaty and under international law. States can agree to limitations on their claims to either territorial sovereignty or "open use" in Antarctica without compromising their juridical position.[320] Thus, a claimant state can enter into an agreement requiring that its claim be exercised or limited in an agreed manner, and a nonclaimant state can similarly agree concerning its exercise of its freedom of action: such an agreement compromises neither the underlying dispute nor the final agreement.[321] This combination of rights and interests to create joint Antarctic sovereignty could once again "freeze" claimancy disputes within the Antarctic Club and in holding the continent out as a single "Antarctic coastal state" there would arguably be jurisdiction for the condominium over the Antarctic continental shelf for resource exploitation.[322] To gain the basic criterion for perfected sovereign title, i.e., general international recognition, economic concessions could be made to the rest of the

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[319]Alexander, A Recommended Approach to the Antarctic Resource Problem, 33 U.Miami L. Rev. 371 (1978), at 416.

[320]Burton, supra note 5, at 467.

[321]Id.

[322]Alexander, supra note 319, at 414; The condominium could declare and enforce a territorial sea, a contiguous zone, an economic zone, and continental shelf areas. Theoretically, the condominium would administer Antarctica as if it were one country's territory, and accordingly, the living and nonliving resources could be exploited as belonging to the condominium. Kindt, supra note 34, at 63.

international community.[323] An excellent summary of the advantages of a condominium scenario in Antarctica is provided by Professor Joyner:

> "[A condominium] approach may be attractive to members of the Consultative Group. It would serve their stated desire for orderly management and control over the commercial exploration and exploitation of Antarctica, particularly in light of the anticipated increase in economic interest in the continent by non-treaty States.
>
> Should this regime of shared rights and responsibilities evolve, it would contain distinct advantages for the Consultative Parties. Such a regime could resolve the question of overlapping claims, since sector claims would be dissolved and the region would be managed cooperatively as a complete entity. The resolution of the claims question, moreover, could further the establishment of a legal regime that would encourage commercial interest in the region. Presumably, private ventures would be less reluctant to invest in resource exploitation in Antarctica if there were some assurance that their efforts would enjoy legal protection. The establishment of a legal authority over the continent would also defuse the objection of certain States to the creation of EEZs in Antarctica. The acceptance of this coastal authority would facilitate the assertion of EEZ and continental shelf rights that could extend from the edge of the pack ice in Antarctica.
>
> Finally, an arrangement of this type could sufficiently delineate and institutionalize the legal status of Antarctica, thus possibly dissuading the Group of 77 from attempting to impose an international regulatory mechanism through the United Nations. Hence, the Consultative Parties' interests in the most valuable of the region's resources--krill, petroleum, and natural gas--would be preserved and consolidated." (footnotes deleted).[324]

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[323] Id.

[324] Joyner, supra note 51, at 721-22.

The condominium approach has been presented in various forms but the basic features of the arrangement are as delineated by Professor Joyner, supra. Of two of the more interesting variations, one calls for a condominium arrangement to oversee the Antarctic resource activities (the concept of "Joint Antarctic Resource Jurisdiction") under the control either of the Treaty members[325] or of the United Nations,[326] the other suggests a collective authority might be possible under Article 305(1)(f) of UNCLOS III.[327] It is outside the purpose of this paper to assess the relative merits of each condominium model, and efforts have been made to summarize the salient aspects of the basic concept so that an assessment of the condominium theory as an option to protect U.S. interests can be made. It is submitted that U.S. support for some form of condominium approach would protect U.S. interests in Antarctica, especially in the area of resource exploitation. The advantages to the United States are very similar to those obtainable if the U.S. were to advocate a continuation of the Antarctic Treaty regime, and in fact it may well be argued that establishment of a condominium arrangement by, and limited to, the Treaty members is no more than an exercise of the flexibility by which the Treaty regime keeps pace with world

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[325]Alexander, supra note 319, at 417.

[326]Pinto, supra note 189, at 483-85.

[327]Antarctica Briefing, "UNCLOS and Antarctica", No. 10, July 30, 1986.

developments. A cautionary note must be added, however, to emphasize that any condominium arrangement that the U.S. supports must be able to ensure that U.S.policy goals (as earlier enumerated)[328] are satisfied. It may seem pedantic to emphasize this point, but the mere existence of a condominium arrangement does not ipso facto make it beneficial to the United States. Great care must be taken not to sacrifice that which the United States already has under the existing Antarctic Treaty regime. The drafting of a "proper" condominium agreement will be left to others, but for this writer's purpose such a "proper" arrangement would clearly be in the best interests of the United States to pursue, if circumstances dictate that such an arrangement is necessary for Antarctica. Although the 1988 Convention on the Regulation of Antarctic Mineral Resources is not yet effective and is not, as presently drafted, an adequate mechanism to safeguard U.S. interests in Antarctica,[329] it is at least arguably a good

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[328]See note 232 supra, and accompanying text.

[329]Briefly, this writer sees several deficiencies in the 1988 Convention on the Regulation of Antarctic Mineral Resources:

1. U.S. access to mineral resources is not guaranteed. In fact, voting procedures under this Convention may give the U.S. less control over Antarctic activities than it presently has. See Convention Articles 3, 22, 32, 48, 51, 54.

2. There are no guarantees for continuation of U.S. mining ventures, once begun. See Articles 32, 51.

3. Rules for liability are not fully established,

faith attempt by the Treaty regime to prepare for the future and protect its collective rights/interests.

While either continuation of the Antarctic Treaty regime or support for an appropriate condominium arrangement would act to ensure U.S. interests in Antarctica, further steps must be taken under either approach to safeguard these interests. As stated earlier, the best option available for the United States is the continuation of the Antarctic Treaty system including, if necessary, an appropriate condominium arrangement within the system. The future viability of the Treaty system, however, and thus the effectiveness of its protection of U.S. interests, will be dependent upon the system's ability to remain

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but are left to formation by consensus in a subsequent Protocol. Article 8(7).

4. No exploration or development is allowed until the Article 8(7) Protocol is in force for that party seeking to explore or develop. Article 8(9).

5. The Commission (Article 21) can prohibit mineral resource activities if it deems such action necessary. Article 13.

6. "Cooperation" with nongovernmental organizations and international organizations "having a scientific, technical, or environmental interest in Antarctica" is mandated, but undefined. Article 34.

7. Budgetary contributions are left to a "to-be-determined", "equitable sharing" plan. Article 35.

8. No surplus revenue (if any) from Antarctic development is allocated for "developing country" use <u>unless</u> such country is using the funds for Antarctic research. Article 35(7)(a).

consistent with the principles of the Treaty and to fashion an arrangement acceptable to the international community at large.[330] With the increasing world competition for food, water, and mineral resources, the extent to which the Antarctic Treaty regime is seen as legitimate may depend in large part on its willingness to acknowledge, and assist in alleviating, international concerns. Additionally, any future action which the U.S. chooses to advocate must also consider the needs of those seven consultative parties which are claimant states (specifically Argentina, Australia, and Chile) who for historical and/or domestic political reasons would consider as unacceptable any effort to infringe upon their assertions of sovereignty.[331]

The first modification to the Treaty system which the United States should espouse is to widen access to consultative meetings by outsiders. While not suggesting that an open public forum is necessary, the current practice of secrecy of consultative meetings lends to non-party distrust of the Treaty regime as a true conservator of the continent. While secrecy may have been needed for the initial success of the Treaty in 1959,[332] it is submitted that any requirement for secrecy has passed or, at the very least, is now outweighed by the need to

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[330]Francioni, supra note 54, at 187.

[331]Alexander, supra note 319, at 417; Myhre, supra note 210, at 12-14.

[332]Auburn, supra note 1, at 93.

acknowledge and accommodate outside interests.[333] Proposals have been made to open consultative meetings to non-consultative parties, and to extend the offer of "observer" status to the United Nations and to other international organizations.[334] The United States has already acknowledged these proposals and has not indicated serious opposition to them.[335] It would be in the best interests of the United States to expressly endorse these ideas a means to close the gap between Treaty and non-Treaty concerns. Another "sunshine" provision to endorse would be the possibility of establishing a small-scale secretariat for the Treaty regime to serve as liaison with the United Nations and other international bodies, to make the reports of consultative meetings public through the United Nations, and to provide greater publicity of Antarctic operations by means of an Antarctic periodical or the greater circulation of research results, especially those which would be of potential benefit to developing countries.[336] Such efforts by the Treaty regime may go a long way toward dispelling what has been perceived as a serious credibility problem of the regime.[337] It is the opinion of this writer

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[333]Myhre, supra note 210, at 5.

[334]Hayashi, supra note 168, at 290.

[335]Colson, supra note 172, at 300.

[336]Hayashi, supra note 168, at 290.

[337]Antarctica Briefing, "The French Airstrip: A Breach of Antarctic Treaty Rules?", No. 9, July 30, 1986; see generally Joyner, Protection of the Antarctic Environment: Rethinking

that all proposals that entail the publicizing of regime information be given serious favorable thought by U.S. policy makers as a means to help legitimize the basis for the future of the Antarctic Treaty regime.

Another modification to the Treaty regime that should be favorably endorsed by the United States, assuming the implementation of a mineral resources management/exploitation plan under the Treaty system, is creating a means by which non-Treaty members can be assured of a share in any economic distribution of Antarctic wealth. It has become apparent that the economic potential of Antarctica is a crucial issue to the future viability of the Antarctic regime, and while some Treaty members may take a very chauvinistic view which opposes sharing Antarctic wealth with nations having no actual investment (of time or resources) in the continent, some recognition of international sharing of benefits may be the best method to keep the NEO/Group of 77 nations at bay. An equitable sharing mechanism, if properly constructed, would serve to blunt the "colonialist" criticisms of the regime. Equitable sharing (the precise formula for which may well result from future negotiations between the Treaty regime and the United Nations) would also be in conformity with the historic principles behind the Treaty itself.[338] Perhaps most importantly, some form of sharing would be a small price for the Treaty regime to pay to

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the Problems and Prospects, 19 Cornell Int'l. L. J. 259 (1986).

[338]Antarctic Treaty, supra note 53, Preamble.

ensure its continuing control over Antarctic operations in general. It is conceded that any sharing arrangement would undoubtably require very delicate and complex negotiations and would certainly be no easy task, either for Treaty or non-Treaty nations, but simply because a task is difficult does not mean that it is impossible. The inherent beauty of the Antarctic Treaty regime has historically been its flexibility and its ability to adapt to changing world circumstances: an acceptable sharing arrangement should be seen as simply another challenge, dictated by the environment of today and the not-so-distant future, that needs to be met for the Antarctic Treaty regime to continue. As far as the United States is concerned, any equitable sharing must first be constructed so as to protect the U.S. interests previously listed;[339] and it must not be established in any way that would not guarantee fair access for the United States to the potential resources. This, of course, would be done within a sharing arrangement which limited itself solely to the sharing of surplus income and did not place restrictions on the exploitation/development operations themselves. A general framework for sharing with non-Treaty members could include letting the United Nations, or a branch thereof, make actual distribution of the funds,[340] leaving funds distribution to some form of sub-Treaty regime

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[339]See notes 232, supra and accompanying text.

[340]Burton, supra note 5, at 497.

commission,[341] or channeling the funds to an organization such as the World Bank or International Monetary Fund for use in a global development effort.[342] A potential problem here is that, since the resource potential of Antarctica is still speculative,[343] any discussion of the distribution of proceeds is also no more than conjecture. It seems clear, however, that the sharing would have to be limited to any surplus income that remains from resource exploitation after allowance is made for the substantial investment costs, a reasonable profit margin commensurate with the high risks involved for the investors (private or state), and the administrative costs of the system.[344] Again, resolution of this problem will be a test of the validity of the Treaty regime, but it is not an insurmountable test: since these economic benefits will accrue to the international community at large without requiring on its part either active participation or investment in Antarctica, the argument for international acceptance is strong.[345] This sharing arrangement would serve to negate much of the potential conflict between the Antarctic Treaty regime and the rest of the international community.

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[341]Luard, supra note 31, at 1188.

[342]Burton, supra note 5, at 510.

[343]See notes 193-204, supra and accompanying text.

[344]Auburn, supra note 1, at 265.

[345]Alexander, supra note 319, at 422.

While support for continuation of the Antarctic Treaty regime (with or without a condominium arrangement) is in the best interests of the United States, there is one more area in which the United States should take action to protect its Antarctic investment. As stated previously, the Treaty regime has the flexibility to adjust to changing conditions, but merely possessing this flexibility is no guarantee that the regime will always be able to adapt. Similarly, there is no guarantee that one or more consultative parties other than the United States will not move to terminate the Treaty, or withdraw from it, if their particular interests so require. Such action in theory could begin as early as 1993,[346] notwithstanding any U.S. efforts to the contrary, and likewise could occur at virtually any time after 1993 upon the request of any consultative party to "review the operation of the Treaty."[347] In light of this possibility, it is necessary for the United States to take measures at the present time to protect its Antarctic interests if such a "worst case scenario" were to emerge. It is submitted that it is in the best interests of the United States to maintain at least its present level of interest and investment in Antarctica and, if possible, to strengthen the U.S. stake by enlarging the present scientific bases and camps as well as by establishing new ones, especially in any areas where a pre-1961 U.S. presence was

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[346]Antarctic Treaty, supra note 53, art. XII.

[347]Id.

effected by either government programs or private expeditions by U.S. nationals. As the Soviet Antarctic program has shown,[348] the Soviets have not failed to take advantage of the opportunities provided by their presence on the continent to strengthen the Soviet case for any future territorial claims.[349] Its steadily expanding scientific and exploratory program has prepared a solid base to bolster the Soviet bargaining position in any future allocation of Antarctic rights.[350] The United States would be well advised to consider a similar program, not only to counter Soviet positioning but also to ensure its own future interests *if* it ever becomes necessary to assert a U.S. territorial claim in Antarctica. While some argue that the termination of the Antarctic Treaty will result in the legal status of the consultative parties reverting to the *status quo ante* of 1959,[351] it is probably more in line with political reality to recognize that no nation is likely to sacrifice all that it has invested in Antarctica since 1959 even if the Treaty ends.[352] Political reality aside, there is nothing in international law that would prevent the United States (or any other nation) from either asserting a

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[348]*See* notes 92-102, *supra* and accompanying text.

[349]Boczek, *supra* note 82, at 857.

[350]*Id.* at 857-58.

[351]Boczek, *supra* note 82, at 857.

[352]Parriott, *supra* note 7, at 91; Boczek, *supra* note 82, at 843.

new claim or enlarging an existing claim,[353] and the United States must be in a position to do just that were the Treaty to no longer be in effect. Even though Article IV(2) of the Treaty "freezes" claims in Antarctica, it can still be argued that such a freeze would not apply to continuing Antarctic activities[354] whether instituted before or after the effective date of the Treaty. Thus, accepting either the "political reality" position or the "continuing activity" approach, a post-Treaty framework would be in place for the assertion of territorial claims, and it behooves the United States to be in a position from which a strong claim can be made. The United States clearly has the historical and equitable basis for a territorial claim:[355] it remains up to the United States to ensure that this basis is recognized, if necessary.

VI. CONCLUSION

From the foregoing analysis, a reassessment has been made and it is submitted that neither the assertion of a U.S. territorial claim nor the relinquishment of present U.S. authority (under the Antarctic Treaty) to the United Nations would be in the best interest of the United States. Assertion of a territorial claim by the United States would be lacking a firm foundation under international law, would promote

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[353] Id. at 92 n. 179.

[354] Id. at 92-3.

[355] See notes 67-79, supra and accompanying text.

extremely negative international reaction, and would surely result in international conflict as other nations rushed in to claim territorial sections of the continent. It is impossible to recreate the American "Wild West" in the Antarctica of today. Furthermore, if international law is to be given any recognition, a U.S. territorial claim might relegate the United States to being forced to accept a claim in Antarctica that, at present, is relatively useless. Nor would United Nations management of Antarctica put the United States in any better position: The United States would be in the clear minority in any U.N. decision-making, given the voting majority of the Group of 77 and the clamor for Antarctic "rights" by the NEO. All U.N. management plans proposed would result in the United States' giving up the power it now has under the Treaty in return for virtually nothing, unless one considers the value of unrequited "global sharing" a reasonable return on a multi-million dollar investment.

This reassessment concludes that the only viable option which maximizes the protection of U.S. policy concerns in Antarctica is a continuation of the Antarctic Treaty regime, with modifications as necessary. Its proven flexibility and adaptability have clearly shown that the system can adjust to changing needs: the 1988 Convention on the Regulation of Antarctic Mineral Resources is but the most recent example of the system's attempt to be responsive. The Treaty regime, to be sure, must now take action to accommodate non-Treaty nation

concerns and to deal with the imminent exploitation of resources. The solution cannot be found totally in the 1988 Convention. The modifications proposed in this paper may go a long way toward meeting those challenges: only the future can tell that. In the meantime, however, and in preparation for a "worst case" scenario, the United States should continue to strengthen its historical and equitable bases for any future territorial claim, should circumstances beyond the control of the United States dictate a course of action which results in the termination of the Antarctic Treaty. It would not be in the interests of the United States to initiate such a course, but it must be ready to respond in case the current system proves ineffective.

The Antarctic Treaty

The Treaty

The Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international co-operation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such co-operation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;

Have agreed as follows:

Article I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manœuvres, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

Article II

Freedom of scientific investigation in Antarctica and co-operation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

Article III

1. In order to promote international co-operation in scientific investigation in Antarctica, as provided for in Article II of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:

(*a*) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

(*b*) scientific personnel shall be exchanged in Antarctica between expeditions and stations;

(*c*) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. In implementing this Article, every encouragement shall be given to the establishment of co-operative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

Article IV

1. Nothing contained in the present Treaty shall be interpreted as:

(*a*) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(*b*) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(*c*) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Article V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

Article VI

The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

Article VII

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this Article.

4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

(*a*) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;

(*b*) all stations in Antarctica occupied by its nationals; and

(*c*) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.

Article X

Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

Article XI

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article.

Article XII

1.—(*a*) The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such Contracting Parties that they have ratified it.

(*b*) Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of sub-paragraph 1 (*a*) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

2.—(*a*) If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

(*b*) Any modification or amendment to the present Treaty which is approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of those whose representatives are entitled to participate in the meetings provided for under Article IX, shall be communicated by the depositary Government to all the Contracting Parties immediately after the termination of the Conference and shall enter into force in accordance with the provisions of paragraph 1 of the present Article.

(*c*) If any such modification or amendment has not entered into force in accordance with the provisions of sub-paragraph 1 (*a*) of this Article within a period of two years after the date of its communication to all the Contracting Parties, any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty; and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.

Article VIII

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under sub-paragraph 1 (*b*) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.

2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of sub-paragraph 1 (*e*) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

Article IX

1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:—

(*a*) use of Antarctica for peaceful purposes only;

(*b*) facilitation of scientific research in Antarctica;

(*c*) facilitation of international scientific co-operation in Antarctica;

(*d*) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;

(*e*) questions relating to the exercise of jurisdiction in Antarctica;

(*f*) preservation and conservation of living resources in Antarctica.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

3. Reports from the observers referred to in Article VII of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.

4. The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.

5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in this Article.

Article XIII

1. The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty.

2. Ratification of or accession to the present Treaty shall be effected by each State in accordance with its constitutional processes.

3. Instruments of ratification and instruments of accession shall be deposited with the Government of the United States of America, hereby designated as the depositary Government.

4. The depositary Government shall inform all signatory and acceding States of the date of each deposit of an instrument of ratification or accession, and the date of entry into force of the Treaty and of any modification or amendment thereto.

5. Upon the deposit of instruments of ratification by all the signatory States, the present Treaty shall enter into force for those States and for States which have deposited instruments of accession. Thereafter the Treaty shall enter into force for any acceding State upon the deposit of its instruments of accession.

6. The present Treaty shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

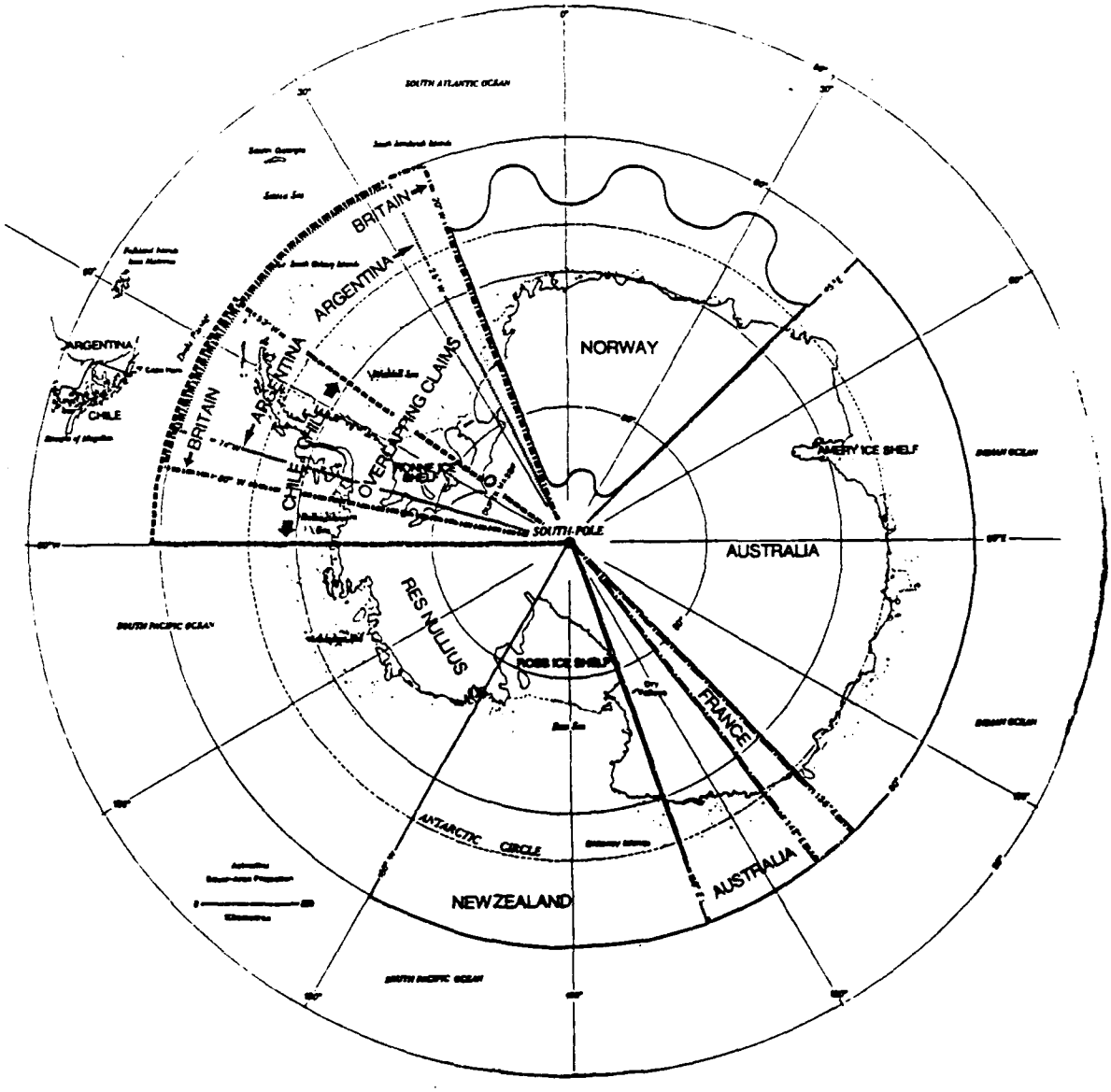
Article XIV

The present Treaty, done in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited in the archives of the Government of the United States of America, which shall transmit duly certified copies thereof to the Governments of the signatory and acceding States.

In witness whereof, the undersigned Plenipotentiaries, duly authorized, have signed the present Treaty.

Done at Washington this first day of December, one thousand nine hundred and fifty-nine.

APPENDIX B



Territorial Claims in Antarctica

Reprinted from M.J. DeWit, MINERALS AND MINING IN ANTARCTICA (1985)

APPENDIX C

In a letter dated December 14, 1946, acting Secretary of State Acheson suggested to Secretary of the Navy Forrestal that the U.S. Naval Antarctic Developments Project, 1947, drop containers enclosing written claims from airplanes and deposit written claims in cairns. Secretary Acheson suggested the written claims be expressed in the following form:

U.S. NAVAL ANTARCTIC DEVELOPMENT PROJECT, 1947

I, _____(name)_____, _____(rank)_____, a member of the United States Naval Antarctic Developments Project, 1947, operating by direction of the President of the United States of America and pursuant to instructions of the Secretary of the Navy, being engaged in the discovery, investigation, and survey of land and sea areas of the Antarctic regions and being in command of a party carrying out the aforesaid instructions,

Hereby declare that we have discovered and investigated the following land and sea areas:

(Here describe briefly what the party has done, means of transportation, course taken, and inclusive dates.)

And I hereby claim this territory in the name of the United States of American and in support of this claim I have displayed the flag of the United States thereon and have deposited this record thereof under the following circumstances:

(Here indicate where and how deposited, or dropped from airplane at approximately _____ South Latitude, and _____ Longitude _____ of Greenwich on this _____ day of _____, 1947.)

Signed: _____

Witnesses:

_____

_____

_____

M. Whiteman, DIGEST OF INTERNATIONAL LAW (1963), at 1249.